Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

BECHTEL ENERGY CORPORATION,
Petitioner,

v.

ROBERT B. REICH, SECRETARY OF LABOR,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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9 pp

QUESTION PRESENTED

In a case brought pursuant to the employee protection provisions of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851, in which

(1) the complainnt and respondent agreed to settle;

(2) the respondent, expecting the Secretary of Labor would approve and join in the settlement as required by the Energy Reorganization Act, paid the complainant the settlement money; and

(3) the Secretary of Labor instead rejected the settlement agreement;

does the collateral order doctrine apply to allow appeal from the Secretary of Labor's decision that he lacks the fundamental adjudicatory powers to bar complainant from proceeding if the complainant does not return the settlement money?

LISTED OF INTERESTED PARTIES AND CORPORATE AFFILIATES

In addition to the parties listed in the caption, the complainant below is John A. Corder. The former parent company and successor-in-interest to Petitioner Bechtel Energy Corporation is Bechtel Corporation.

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OPINIONS BELOW

None of the decisions below were published in official reporters. The orders of the United States Court of Appeals for the Fifth Circuit dismissing the case for lack of appellate jurisdiction and denying the petition for rehearing are reproduced at Appendix A and G, respectively. The following orders are also reproduced in the Appendix: the order of the Secretary of Labor which was appealed to the Fifth Circuit, *Corder v. Bechtel Energy Corporation*, Case No. 88-ERA-9, Sec. Dec., September 12, 1995, slip op. (App. B) ; the earlier order of the Secretary rejecting a settlement, *Corder v. Bechtel Energy Corporation*, Case No. 88-ERA-9, Sec. Dec., February 9, 1994, slip op. (App. E); an order of the Secretary of Labor in a similar case which was specifically relied upon in the Secretary's order of September 12, 1995, *Macktal v. Brown & Root, Inc.*, Case No. 86-ERA-23, Sec. Dec. Jul. 11, 1995, slip op. (App. F); the Administrative Law Judge's Order Granting Respondent's Motion to Stay the Proceedings, July 12, 1994 (App. D); and the Administrative Law Judge's Recommended Order of Dismissal, August 30, 1994 (App. C).

BASIS FOR JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on December 18, 1995. A petition for rehearing was filed and denied by an order entered February 19, 1996. Bechtel Energy Corporation requests this Court to exercise its jurisdiction to review on writ of certiorari in accordance with the statutory provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves the due process clause of the Fifth Amendment of the Constitution of the United States of America, which provides as follows:

> **No person shall ... be deprived of life, liberty, or property without due process of law ....**

This case also involves the employee protection provisions of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851, the provisions of Sections 554 to 556 of the Administrative Procedures Act, 5 U.S.C. §§ 554-556, and regulations promulgated by the Secretary of Labor, including the provisions of Sections 18.1, 18.6 and 18.29 of Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. §§ 18.1, 18.6 and 18.29, and Procedures for the Handling of Discrimination Complaints under Federal Employee Protection Statutes, 29 C.F.R. §§ 24.5. Because of the length of the provisions involved, they are set forth at Appendices H-K.

STATEMENT OF THE CASE

This case began more than eight years ago when John A. Corder ("Corder"), a former employee of Bechtel Energy Corporation ("Bechtel") at the South Texas Nuclear Power Project (the "Project") sent a letter to the Department of Labor (the "DOL") asserting that Bechtel's proposed October 15, 1986 layoff and his retirement in lieu of the layoff actually was a constructive discharge resulting from alleged whistle blowing activities. Corder's letter was both untimely, having been filed more than 30 days after the challenged employment decision, and failed to satisfy the

requirements for a complaint under the employee protection provisions of the Energy Reorganization Act of 1974 (the "ERA"), 42 U.S.C. § 5851 (the "whistleblower law"). The DOL investigated, nevertheless, the alleged violation in accordance with the whistleblower law. Upon completion of the investigation, the Secretary notified Corder and Bechtel of its conclusions that Corder's claim was unprovable because (1) Corder's charges did not involve nuclear safety and (2) his layoff was part of Bechtel's ongoing reduction in force program at the Project. (*See* DOL's letter of January 4, 1988 at Appendix L).

Corder then purported to exercise his statutory right to request a public hearing before the Secretary's preliminary conclusion became final. However, before a hearing was held, Bechtel and Corder reached a settlement agreement. The settlement was presented to the Administrative Law Judge ("ALJ") who approved of the settlement and recommended the case for dismissal with prejudice. The Secretary's practice had been, in the event a settlement agreement contained a provision which offended public policy, to sever the offending provisions and approve the remainder of the agreement. *See, e.g., Polizzi v. Gibbs & Hill, Inc.*, Case No. 87-ERA-38, Sec. Order Rejecting in Part and Approving in Part Settlement Submitted by the Parties and dismissing Case, July 18, 1989, slip op. at 5-7. Bechtel, assuming the Secretary would approve the settlement, paid Corder $67,500 in consideration for a full and complete release. (*See* ALJ's Order of July 12, 1994, pp. 1,2, at Appendix D).

While the case *sub judice* was pending and waiting disposition by the Secretary of Labor, another whistleblower case, procedurally senior to the *Corder* case, was also pending. *In the Matter of Joseph J. Macktal, Jr., v. Brown & Root, Inc.*, Case No. 86-ERA-23. The disposition of the *Macktal* case would ultimately come to control the disposition of the *Corder* case, despite important factual and

procedural dissimilarities between the two cases. The Fifth Circuit eventually ruled in *Macktal* that the Secretary, when considering settlement agreements, could not sever provisions offending public policy and enforce the remainder, but could only accept or reject the settlement agreement as written. *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1155-56 (1991). Based on *Macktal*, the Secretary finally issued a decision on February 9, 1994 in which he concluded that the settlement agreement in the case *sub judice* contained confidentiality provisions violating public policy and rejected the settlement agreement, remanding the case. *Corder v. Bechtel Energy Corporation*, Case No. 88-ERA-9, Sec. Dec., February 9, 1994, slip op. at 5-8 ("Secretary's Order Rejecting Settlement").

Long before either the Fifth Circuit decision in *Macktal* or the Secretary's Order Rejecting Settlement, and only about eight months after the settlement agreement had been approved by the ALJ, Bechtel became aware of a new federal policy against settlement agreements containing provisions which might restrict the Nuclear Regulatory Commission's (the "NRC") access to information. At that time, in June 1989, Bechtel unequivocally communicated to Corder through his counsel that Bechtel's position was that the settlement agreement did not prohibit Corder from discussing any information about nuclear power plant safety with the NCR, Bechtel, the local power company, or the news media, and in effect was waiving any such right to impose confidentiality obligations on Corder.

Subsequently, following the Secretary's Order Rejecting Settlement, Bechtel tendered an amended settlement agreement, identical to the first, except for omitting each of the provisions which the Secretary had found imposed a confidentiality obligation upon Corder in violation of public policy. The amended settlement agreement only omitted provisions which had imposed duties upon Corder. It did not omit any provisions which conferred rights or privileges

upon Corder. Despite the fact the amended settlement agreement was *more favorable* to Corder, Corder refused to sign it. Corder has since demanded even more money to enter into a new settlement agreement.

On March 25, 1994, Bechtel moved to stay proceedings until the complainant returned the settlement money he had already received or entered into a settlement agreement acceptable to the Secretary. Bechtel's motion *did not* argue that the settlement agreement gave it a right to not stand trial; far from it, Bechtel acknowledged *that there was no settlement agreement* but argued that the complainant should be barred from proceeding until he returned the settlement money. On July 12, 1994 the ALJ entered an order staying the proceedings pending return of the settlement money or completion of a new settlement agreement and subsequently issued an order recommending dismissal for Corder's failure to do either. On September 12, 1995, the Secretary signed an order holding that he did not have the fundamental adjudicatory power to bar Corder from going forward, and rejecting the ALJ's recommendation. *Corder v. Bechtel Energy Corporation*, Case No. 88-ERA-9, Sec. Dec, September 12, 1995, slip op. at 1-2("Secretary's Order"). The Secretary"s Order found that "[a]lthough the Secretary had never approved the settlement, [Bechtel] had paid [Corder] $67,500 as provided in the settlement." The Secretary's Order itself was devoid of any analysis justifying his position but instead incorporated by reference the reasons discussed in *Macktal v. Brown & Root, Inc.* , Case No. 86-ERA-23, Sec. Dec. Jul. 11, 1995, slip op. at 2-8 (The "Macktal Order").

Bechtel filed its petition for review of the Secretary's Order with the Court of Appeals for the Fifth Circuit on September 27, 1995. On October 31, 1995 the Secretary filed its Motion to Dismiss based on lack of appellate jurisdiction and a Motion to Defer Filing of the Agency Record pending the outcome of the Motion to dismiss. On

November 9, 1995, Bechtel filed its Response in Opposition to the Motion to Dismiss, its Response in Opposition to the Motion to Defer Filing of the Agency Record, and Motion for Leave to Supplement Response to Motion to Dismiss within seven days of filing of agency record. On December 18, 1996, the Court of Appeals granted the Motion to Dismiss and denied the Motion to Defer and Motion to Supplement as moot. On February 1, 1996, Bechtel filed its Petition for Rehearing. On February 19, 1996, the Fifth Circuit entered its Order denying the Petition for Rehearing.

ARGUMENT

There are compelling reasons to grant this Petition for Writ of Certiorari because (1) the Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, and (2) the Fifth Circuit has sanctioned such a departure by the Secretary from the accepted and usual course of judicial proceedings as to call for exercise of this Court's supervisory power. This appeal concerns neither erroneous factual findings nor the misapplication of a properly stated rule of law. Rather, this case presents purely a question of law regarding the nature of the Secretary's adjudicatory powers.

I. UNLESS HEARD PURSUANT TO THE COLLATERAL ORDER DOCTRINE THIS QUESTION OF PARAMOUNT IMPORTANCE AND BROAD APPLICATION CONCERNING THE FUNDAMENTAL ADJUDICATORY POWERS OF ADMINISTRATIVE AGENCIES WILL REMAIN UNADDRESSED BY THE FEDERAL COURTS

This is an important case which merits certiorari review because it calls into issue the nature and extent of the

powers of the Secretary of Labor and of administrative agencies in general when acting as adjudicatory bodies.

The question presented in this appeal may be broken down into two important questions of federal law which have not yet been decided by this Court:

> **Does due process require application of the collateral order doctrine to permit appellate review of an agency adjudicatory decision which is (1) entirely separate from the merits; (2) its final word on its fundamental adjudicatory powers to control the further conduct of the proceedings; and (3) not correctable on appeal from final judgment?**
>
> **Does an administrative agency exercising adjudicatory functions have fundamental adjudicatory powers to insure the efficiency and due process fairness of proceedings, such as the power to dismiss for failure to obey an order or for want of prosecution?**

The first question should be considered by this Court because a collateral order appeal of this case is necessary in the "interest of achieving a healthy legal system." *Cobbledick v. United States*, 309 U.S. 323, 326 (1940). The collateral order doctrine is applicable, in particular, to threshold questions whose resolution is necessary to the further conduct of the litigation, such as those involving the ground rules and underlying conditions or "rules of engagement" which will define the context of the case. *See, e.g., Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 545, 546 (1949); *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148 (1964).

Moreover, unless the question on collateral order appeal is reached, and the doctrine is applied to allow appeal, the second, and more important, question will probably never

be decided by any federal court, let alone by this Court. The second question is unlikely to be adequately considered on appeal from a full and final judgment on the merits because the primary interests which it concerns -- an efficient, rational and balanced administrative adjudicatory system and Bechtel's due process right to a fair trial -- would already be compromised. Indeed, denial of collateral order appeal, in itself, would be a deprivation of due process because due process requires some meaningful review by the federal courts of agency decisions. *See Yakus v. U.S.*, 321 U.S. 414, 444 (1944).

The second question is critical to the proper functioning of adjudications before the Secretary, and bears, as well, on the functioning of administrative adjudications in general. The Secretary has concluded that he lacks certain basic powers to control and manage the fairness and efficiency of adjudicatory proceedings before him. In so doing, the Secretary has misunderstood the fundamental attributes of the adjudicatory power conferred upon him by the applicable statutes, the Constitution and the inherent necessity of the type of power he is being asked to wield. Moreover, the mistake in the Secretary's analysis occurs at such a basic level that it is likely to corrupt the Secretary's approach to other questions about his powers. The consequences of the Secretary's position are far-reaching, and, if consistently applied, would prevent him, for example, from using the ultimate sanction of dismissal to deter a litigant's failure to prosecute or failure to obey a lawful order of the Secretary or the ALJ. As a result of the Secretary's decision, not only has Bechtel been deprived of the due process right to a fair trial, but the adjudicatory system itself is thrown out of balance.

Since it is the importance of the second question (the extent of the Secretary's powers) which determines, in large part, the importance of the first question (appealability), it is necessary to understand why the second question is

important. And in order to understand why the second question is important, it is necessary to understand why and how the Secretary's approach, and answer, was wrong.

The Secretary's approach

The Secretary's mistake stems from a fundamental misconception about the power he is being asked to wield. This misconception leads him, in part, to mischaracterize a distinctly adjudicatory function as rulemaking, which, in turn, leads him to a faulty analysis that his ability to control adjudicatory proceedings before him and to exercise fundamental adjudicatory powers is somehow affected by the lack of a "broad delegation of rulemaking authority." Macktal Order at 3 (App. F, p. 24a).

The Secretary misconceived the issue in the case *sub judice* when he adopted the following language from the Macktal Order: "[b]oth parties recognized in their briefs that the crucial issue here is whether the Secretary has the authority to *order Complainant to return the settlement money*." Macktal Order at 3 (App. F, p.24a). That may have been the issue in the Macktal case, but it is not the issue in the case *sub judice*. This case does not concern whether the Secretary has been delegated the power to award certain *affirmative remedies*; rather, this case concerns whether the Secretary may exercise certain gatekeeper functions to control access to his tribunal and certain caretaker functions to control the course of proceedings before him. Specifically, in the context of this case, the question is whether the Secretary, in order to ensure the fairness and efficiency of the adjudicatory proceedings before him, has the power to bar Corder from going forward until he returns the settlement money.

The Secretary, apparently thinking this was ultimately a *policy* question of what sort of affirmative remedies the whistleblower law does, or should, afford, approached the

issue of his powers in this context from the perspective of his *rulemaking authority*. The Secretary reasoned that "in the absence of a broad delegation of rulemaking authority, neither an ALJ nor the Secretary has the power to enter such an order." Macktal Order at 3 (App. F, p. 24a). Although the Secretary acknowledged that this issue was "in the context of an adjudicatory proceeding, rather than by regulation" he apparently considered that all adjudicatory powers exercised by a "unitary agency" stemmed from its rulemaking authority: "a 'unitary agency,'" he wrote, "one combining policymaking, legislative and adjudicatory powers, *may use adjudication to engage in lawmaking and policymaking* where it has been delegated powers to make law and policy through rulemaking and necessarily interprets the rules it promulgates. Macktal Order at 3, n.3 (App. F, p.24a), citing *Martin* (emphasis supplied).

The Secretary's approach fails to consider the obvious point that some adjudicatory powers are inherent in the nature of an adjudicatory body, and are indeed necessary to carry out adjudicatory functions. Such fundamental adjudicatory powers have nothing to do with an agency's "lawmaking and policymaking", at least not within the specific subject area of the administrative agency's expertise. There is a compelling public policy rationale supporting the recognition of fundamental adjudicatory powers in agencies exercising judicial functions, which is a concern not only of the Secretary of Labor, but, more importantly, of the federal judicial system.

II. THE SECRETARY'S APPROACH RESULTS IN A RADICAL DEPARTURE FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS

The Secretary assumed that his adjudicatory powers are limited by the scope of his rulemaking authority. This

assumption leads the Secretary to characterize granting a dismissal as, in effect, providing an affirmative remedy to the responding party, the employer. Consequently, adherence to this approach deprives him of the power to wield the sanction of dismissal to ensure the fairness and efficiency of the adjudicatory proceedings before him in practically any context. As discussed below, any adjudicatory body, as a function of its ability to manage its own affairs and to safeguard due process, must have the inherent power to dismiss proceedings where the complainant has waived his right to proceed or has so prejudiced his rights by his actions as to be estopped from proceeding. The Secretary's Order, if correct in its reasoning, leads inescapably to the conclusion that he does not have this power to manage or control either aspect -- fairness or efficiency -- of adjudications before him. Indeed, the Secretary's approach, if applied consistently and rationally, undermines the authority for various regulations which he has already promulgated.

A. The Secretary's approach produces a result alien to our basic concept of justice

The nature of the Secretary's mistake is likely to corrupt his approach to other questions regarding his adjudicatory powers and produce results alien to our basic concept of justice. Indeed, agencies are required to apply their adjudicative rules of decision consistently. *Contractors Transport Corp. v. United States*, 537 F.2d 1160 (4th Cir. 1976); *Brennan v. Giles & Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974). A simple example demonstrates just how radical a departure from the accepted and usual course of judicial proceedings the Secretary has endorsed.

It is well-established that once a complaint is filed under Section 5851, the Secretary obtains jurisdiction over the matter which cannot be defeated by the mutual agreement

of the complainant and respondent to dismiss. The Secretary must become a party to any such settlement agreement. *Macktal*, 923 F.2d 1150, 1155-56 (5th Cir. 1991). However, there is no such requirement that the Secretary bless a settlement agreement between the putative complainant and putative respondent entered into *before* the complaint is filed. Moreover, such a settlement agreement, if not avoided, should be sufficient basis to apply estoppel or waiver to the complainant's cause of action.

Yet, if the complainant were to file a complaint under Section 5851, after having settled, and the respondent moved that he be barred from proceeding unless he paid back the settlement money, the Secretary would, according to his analysis in the case *sub judice*, be powerless to bar the complainant from proceeding, even if the complainant acknowledged the settlement agreement and made no effort to avoid it. "To begin with, no agreement cognizable under the Act settling Complainant's ERA claim has ever been reached because the Secretary never approved it.... The parties have an active dispute pending before me under the ERA *which I must resolve as provided in the Act*. I have *no power* to resolve their dispute over an alleged partially performed contract *to which I am not a party* and which addresses many other matters over which *I have no jurisdiction*". Macktal Order at 6-8 (App. F, pp. 27a-28a) (emphasis supplied; citations omitted).

Certainly, barring the complainant from going forward could not be based on the Secretary's enforcing the privately-negotiated settled agreement because awarding this type of affirmative relief is not included in the Secretary's statutory delegation of powers: "I find *no authority in the ERA* for me to rectify inequitable bargains or order restitution of monies unfairly retained simply because the parties' dispute concerns, among other things, the whistleblower provision of the ERA." Macktal Order at 6 (App. F., p. 27a) (emphasis supplied; footnote omitted).

Of course, common sense, if nothing else, would suggest that the Secretary should have some power, by virtue of being an adjudicatory body, to put a stop to the proceedings, even if he did not have the power to enforce any affirmative covenants in the agreement, such as a clause requiring the complainant to provide consulting services to, or to cooperate in some way with, the respondent. Such an argument would surely be based on the rationale that even if the Secretary had no general jurisdiction to enforce all the terms of the settlement, at least he must have some power to enforce the settlement to the extent it impinged on circumstances within his jurisdiction, such as the management and control of the adjudicatory proceedings before him.

B. The Secretary's approach is likely to undermine regulations he has already promulgated

The Secretary has promulgated various regulations to govern the litigation of actions before him. *See* 29 C.F.R. §§ 18.1 *et seq.*, 24.1 *et seq.* Two regulations, in particular, contemplate the ultimate sanction of dismissal. The ALJ may, as a sanction, "[r]ule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both." 29 C.F.R § 18.6(d)(2)(v). An ALJ can also dismiss a claim for cause "[u]pon the failure of the complainant to comply with a lawful order of the administrative law judge." 29 C.F.R. §24.5(4)(i)(B).

It is readily apparent that neither of these powers are contained within the Secretary's grant of "rulemaking authority." Yet, the Secretary's analysis in the Macktal Order, if applied consistently and rationally, would prevent

him from granting a dismissal since it is, in effect, an affirmative remedy to the respondent. The result is that the Secretary's own regulations, designed to allow the ALJ (and, ultimately, the Secretary) to dismiss for a variety of reasons--such as failure to submit to deposition, failure to produce documents, failure to answer interrogatories, appear for hearing, or failure to prosecute a claim -- would be without authority.

C. The Secretary's approach results in a continuing threat to judicial economy

The Secretary's approach, because it undermines his ability to summarily dismiss actions like this one -- which the Secretary himself concluded was unprovable -- needlessly increases the burden on the administrative system and wastes its judicial resources.

Once again, the simple example discussed above illustrates the folly of the Secretary's approach. It would be an incredible waste of judicial resources, as well as a deprivation of the respondent's due process rights, to allow a complainant in effect to come to the Secretary and say, yes, I have traded away my rights under Section 5851, and no, I'm not asserting that the settlement was fraudulently induced or otherwise should be avoided, but I'm bringing this action and requiring a hearing because you're powerless to stop me.

Since agencies are required to apply their rules of decision consistently, *see Contractors Transport*, 537 F.2d 1160, *supra*, the Secretary would be bound to his "rulemaking authority" not only in radical examples such as the one above, but also in more ordinary contexts in which he presumes the power to dismiss, such as for failure to comply with discovery, failure to appear for hearings, or failure to prosecute. At the very least, the Secretary's decision invites litigants to assert such challenges to

dismissals based on procedural grounds not only in actions before the Secretary, but also in actions before other federal agencies.

III. THE CONSTITUTION, THE APPLICABLE STATUTES, AND THE INHERENT NATURE OF JUDICIAL FUNCTIONS SUPPORT THE EXISTENCE OF THE SECRETARY'S BASIC ADJUDICATORY POWERS TO CONTROL AND MANAGE THE PROCEEDINGS

Once the issue is framed as a question of the Secretary's general adjudicatory powers, it becomes apparent that such powers are supported by the statutory framework, necessary to protect the Constitutional right to due process, and inherent in the nature of judicial functions.

A. The statutory and regulatory framework supports the existence of fundamental adjudicatory powers to control the proceedings before the Secretary

As discussed above, there is both an intuitive notion that the Secretary should possess basic adjudicatory powers, including the power to dismiss on procedural grounds, in order to control and manage litigation, and strong federal policy reasons to support the existence of such powers, namely, the promotion of efficiency and due process fairness in adjudicatory proceedings. While there is no express language in the applicable statutes which grants the Secretary the power to dismiss a complainant's action for failure to return settlement money, such a power is implied in the Congressional grant of judicial power to the Secretary, as a review of the statutory framework reveals. Moreover, the Secretary's own regulatory framework implicitly relies upon these principles of efficiency and due process. As Justice

Frankfurter once wrote, "[f]rom a great mass of cases, running the full gamut of control over property and liberty, there emerges the principle that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning." *Joint Anti-Fascist Refugee Committee v. McGrath, Attorney General*, 341 U.S. 123, 165 (1951) (Frankfurter, concurring).

The specific statutory provisions governing the Secretary's powers under the whistleblower provisions of the ERA are set forth at 42 U.S.C. § 5851. The adjudicatory powers of the Secretary under section 5851 is also defined, in part, by the Administrative Procedures Act (the "APA") contained in Title V of the United States Code. *See* 5 U.S.C.§§ 554-556. The Secretary has promulgated regulations interpreting section 5851. *See* 29 C.F.R. §§ 24.1 *et seq.* The Secretary has also adopted certain Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges ("Rules of Practice and Procedure"). 29 C.F.R. §§ 18.1 *et seq.*

1. Analysis of Section 5851

Section 5851 gives the Secretary three options in the final disposition of a complaint filed pursuant to section 5851(b)(1). The Secretary may (1) enter into a tripartite agreement with the complainant and the respondent settling the dispute; (2) issue an order providing the relief; or (3) issue an order denying the complaint. *Macktal, supra* 923 F.2d at 1153. The power to dismiss Corder's complaint derives from the third option, denying the complaint. While Section 5851 enumerates some grounds which are sufficient to deny the complaint, these grounds are not exclusive of other bases. 42 U.S.C. § 5851(b)(3).

Macktal is not inconsistent with this analysis. *Macktal* deals primarily with option number one, settlement. *Macktal* does not address the grounds upon which the

Secretary can "deny the complaint."

Neither the statute nor Constitution prevents the Secretary from denying the complaint before a hearing is held. Section 5851 itself contemplates instances in which the complaint *must* be denied before a hearing is held. "The Secretary *shall* dismiss a complaint filed under paragraph (1) and *shall not* conduct the investigation under paragraph (2) unless the complainant has made a prima facie showing ..." 42 U.S.C. § 5851(b)(3)(A) (emphasis supplied). "Notice and opportunity for public hearing" does not require that a hearing actually be held in all cases. A litigant may waive his statutory or Constitutional rights to a hearing. *U.S. v. Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432 (9th Cir. 1971). An oral evidentiary hearing is required only to resolve disputed facts. *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620 (1973). Where the hearing would be useless, it need not be held. *See, e.g., Independent Bankers Assoc. of Ga. v. Bd. of Gov. of the Fed. Res. Sys.*, 516 F.2d 1206 (D.C. Cir. 1975).

2. Analysis of the APA and Regulations

The overarching framework of the APA complements the adjudicatory powers conferred in Section 5851. In particular, Section 556 of the APA contemplates the exercise of general, unenumerated adjudicative powers by administrative agencies: the presiding officer may "regulate the course of the hearing," "dispose of procedural requests or similar matters," and "take action authorized by agency rule consistent with this subchapter." 5 U.S.C. § 556(c)(5), (7) and (9).

Relying upon the ERA and the APA, the Secretary has promulgated regulations governing the litigation of claims before the Secretary. In particular, the regulations incorporate the Federal Rules of Civil Procedure to define the scope of the ALJ's powers and govern "any situation not

provided for or controlled by these rules, or by any statute, executive order or regulation." 29 C.F.R § 18.1, 18.19. Since no stream can rise higher than its source, if the ALJ has a power, the Secretary himself must have the same power.

3. Rule 41(b) power to dismiss and a court's inherent power to manage its affairs.

Among the powers enumerated by the Federal Rules of Civil Procedure is a broad discretionary power to grant an involuntary dismissal upon a wide variety grounds. *See* Fed.R.Civ.P 41(b). Other rules express the power to dismiss upon more specified grounds. See Fed.R.Civ.P. 4(m), 12, 25(a), 37, 52(c), 59(e), 60(b). Rule 41(b) provides in pertinent part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

It is well-established that Rule 41(b) merely codifies, in part, a court's inherent power to manage its affairs. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-32 (1962); *Flaksa v. Little River Marine Constr. Co.*, 389 F.2d 885, 887 (5th Cir. 1968) *cert. den.* 392 U.S. 928. "The power is of ancient origin, having its roots in judgments of *nonsuit* and *non prosequitur* entered at common law ... and dismissals for want of prosecution of bills in equity." *Link, supra*, 370 U.S. at 629.

The purpose of Rule 41(b) is to serve as a safeguard against delay in litigation and harassment of a defendant. *Colokathis v. Wentworth-Douglass Hosp.*, 693 F.2d 7,9 (1st Cir. 1982) *cert. den.* 415 U.S. 915. The court's power to dismiss an action is an inherent aspect of its authority to

enforce its orders and insure prompt disposition of law suits. *Dynes v. Army Air Force Exchange Service*, 720 F.2d 1495, 1499 (11th Cir. 1983). Thus, Rule 41(b) promotes both fairness and efficiency.

The power that inspires Rule 41(b) is an extremely flexible one, justifying a wide variety of the grounds upon which dismissal may be based. For example, Rule 41(b) power was invoked in an action that had been pending over five years, in which the defendant accepted the plaintiff's offer of settlement and tendered its performance. *Reid v. Prentice-Hall,* 261 F.2d 700 (6th Cir. 1958). The plaintiff refused tender and demanded a higher figure. The court ordered the plaintiff to accept tender or suffer dismissal, and proceeded to dismiss when the plaintiff refused tender. "The court has inherent power, so long as it retains control of the subject matter and of the parties, to correct that which has been wrongly done by virtue of its process ... The court has inherent power to punish abuse of its process by dismissal of an action in the interest of orderly administration of justice." *Id.* at 701. *Reid*, of course, also demonstrates the dual public policy reasons which mandate dismissal in this sort of case: fairness to defendant and preservation of judicial resources.

As with *Reid*, the case at bar also justifies invocation of Rule 41(b) power. This case has also been pending a long time (almost nine years); Corder and Bechtel reached a settlement which was rejected by the Secretary only because of its confidentiality provisions; Bechtel retendered a settlement agreement omitting the confidentiality provisions which was *more favorable* to Corder. The treatment of the complainant in this case is even more lenient because he was given the option of accepting the new agreement, which was more favorable to him, or returning the settlement money and proceeding with his case.

B. Constitutional due process concerns support the existence of the Secretary's power to dismiss

The Secretary must be able to exercise certain fundamental adjudicatory powers, including the power to dismiss in the case *sub judice*, in order to comply with Constitutional requirements of due process. This Court has said that administrative adjudicatory proceedings must comport with "rudimentary requirement of fair play." *Morgan v. U.S.*, 304 U.S. 1,14,15 (1938). "Due process in administrative proceedings of a judicial nature has been said generally to be conformity to fair practices of Anglo-Saxon jurisprudence ... which is usually equated with adequate notice and a fair hearing ...." *Hornsby v. Allen*, 326 F.2d 605, 608 (5th Cir. 1964).

The type of due process which administrative agencies must observe is not fixed and rigid, but is a fluid concept which adjusts to the circumstances of the case. As Justice Frankfurter observed in *McGrath, supra*, due process is not a "technical conception" with a fixed content unrelated to time, place and circumstances. *Joint Anti-Fascist Committee v. McGrath, supra*, 341 U.S. at 162. "Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess." *Id.* at 162, 163.

Perhaps the most fundamental requirement of a fair hearing is the necessity of a "level playing field." In the case *sub judice*, the field is decidedly tilted in Corder's favor, since he has both the settlement money and the

opportunity to sue again under the whistleblower law: a gamble totally devoid of risk. "[J]ustice... require[s] the employee who seeks to avoid the obligation [not to sue] to return the consideration which he received..." *Wamsley v. Champlin Refining & Chemicals, Inc.* 11 F.3d 534, 542 (5th Cir. 1993)

Only in exceptional instances, where there has been an urgent and overriding threat to the public welfare, has a court inverted the time-honored tradition of hearing first, remedy afterwards. *See, e.g., North American Cold Storage, Inc.*, 211 U.S. 306 (summary destruction of food believed to be unsafe); *Ewing v. Mytinger*, 339 U.S. 594 (1950) (summary seizure of drugs believed to be mislabeled); *Fahel v. Mallonee*, 332 U.S. 245 (1947) (Court characterized seizure of savings and loan as "drastic" but upheld the procedure as necessary because preserving the credit of a financial institution is an overiding government interest). Indeed, Bechtel's plight is even more drastic, inasmuch as the purpose of continuing the proceedings *is not to give Bechtel a chance to recover the money, but to give Corder a chance to obtain more*. There is, of course, no urgent and overriding need for Corder to both keep the money and have "another bite at the apple."

Although it is Corder who benefits, it is the government's involvement which has resulted in Bechtel's deprivation of due process. The Secretary has ruled that there is nothing that Corder can do unilaterally to prejudice his rights under the whistleblower law: "I have no power to resolve their dispute over an alleged partially performed contract to which I am not a party...." Macktal Order at 7. That is, *in order for Corder to waive his rights, the government must consent.*

IV. DUE PROCESS AND THE INTEREST IN ACHIEVING A HEALTHY LEGAL SYSTEM REQUIRES THE COLLATERAL ORDER DOCTRINE TO BE APPLIED TO THIS CASE

The Court of Appeals dismissed the case at bar without opinion for lack of appellate jurisdiction, implicitly finding that the collateral order doctrine does not apply. It is likely that this decision was based on a superficial resemblance to the recent Supreme Court case of *Digital Equipment Corp. v. Desktop Direct, Inc., supra* __ U.S.__, 114 S.Ct. 1992 (1994). As discussed below, each of the requirements of the collateral order doctrine are satisfied and the case *sub judice* is distinguishable from *Digital Equipment* for two very significant reasons: (1) this appeal presents purely a question of law regarding the Secretary's adjudicatory powers, while *Digital Equipment* involved an inherently very factual inquiry concerning the terms and possible defenses (such as fraudulent inducement) to a settlement agreement; and (2) the litigant in *Digital Equipment* asserted a putative right to not to stand trial based on a private contract, whereas Bechtel acknowledges there is no settlement agreement but argues that the Secretary's Order deprives Bechtel of its due process rights to a fair trial and judicial review of agency action and creates a fundamental imbalance, and lack of efficiency, in the system. Unlike the problem presented by *Digital Equipment*, here the judicial system itself which will suffer unless this Court grants certiorari review and applies the collateral order doctrine. Moreover, depriving Bechtel of collateral order appeal deprives Bechtel of its due process right to judicial review of agency decisions.

As this Court stated in *Digital Equipment*, there are three fundamental requirements which must be met in order for the collateral order doctrine to apply: the decision must (1) conclusively determine the disputed question; (2) resolve

an important question completely separate from the merits; and (3) be effectively unreviewable on appeal from final judgment in the underlying action. 114 S.Ct at 1995, 1996.

The Secretary's Order refusing to dismiss the action and remanding it for trial is naturally conclusive of the disputed question: whether Corder must repay the settlement money before he proceeds. The Secretary's decision is not even open to reconsideration, since he has concluded not that Corder should not be estopped, but that he does not even have the power to estop Corder if he believed such action to be in the interest of justice. *Digital Equipment* is distinguishable on this point; this Court found that it was unclear whether the trial court's decision regarding recision of the settlement agreement was indeed the final word on the matter or whether the trial court might let the jury decide it as a threshold inquiry. *Id.* at 1996, n.2. In the case at bar, there is no such jury (*i.e.* factual) question and it is the ALJ himself, not a jury, who would be the final arbiter of any such question.

The disputed question in the case at bar is also separate from the merits. It is purely a question of law as to whether the Secretary has the power to dismiss Corder's action if he does not return the settlement money, and not one of fact whether he should dismiss it. Indeed, for purpose of this appeal, it should be assumed that the Secretary would dismiss if he believed he had the power to do so. Thus, unlike *Digital Equipment*, the Secretary's Order is not "enmeshed in the factual and legal issues comprising the plaintiff's cause of action."

Most important, though, is that this appeal presents a question which is both important and effectively unreviewable on appeal from a final judgment on the merits. As emphasized in *Digital Equipment*, the "availability of collateral order appeal must be determined at a higher level of generality." *Id.* There could scarcely be a higher level of generality then the question presented by this appeal. Unlike

Digital Equipment, this case does not present a question whose answer could turn on the vagaries of the wording of a settlement agreement or the circumstances of its making. Instead, it concerns a vital issue regarding the healthy balance of the system itself. It presents an organic question about how our system works, and even more importantly, how it should work.

Also important is that the issue presented by this appeal cannot be effectively reviewed on appeal from a final decision on the merits. It is that proverbial "bell which cannot be unrung." Once Bechtel is subjected to a trial in these unfair circumstances, it has already been deprived of due process. Moreover, once the unfair proceedings take place, the damage to the system has been done. Nor is there any guarantee -- far from it -- that the issue of the Secretary's adjudicatory powers would even be reached on any appeal from the final decision on the merits -- or even that there would be any such appeal. Indeed, unless reviewed on collateral order appeal, there is a strong possibility that the Secretary's decision about the extent of his adjudicatory powers would never be reviewed by a federal court. This, in itself, is a deprivation of due process. *See Yakus v. U.S.*, 321 U.S. 414, 444 (1944) (subjecting a party to agency action without the opportunity for judicial review is a deprivation of due process).

In one aspect, this case presents precisely the same sort of question for appellate review as did *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 545, 546 (1949): does the plaintiff have to pay (or, in this case, return) money before going forward with his claim. Of course, the case at bar presents this question in the context of the larger issue of the Secretary's powers. In *Cohen*, the right involved (the requirement that plaintiff post bond) was effectively lost once the proceeding was over. "When [final disposition of the merits of the case] comes, it will be too late effectively to review the present order and the rights

conferred by the statute, if applicable, will have been lost, probably irreparably." *Cohen, supra*, 337 U.S. at 546. The benefit denied is the security of the bond while the litigation proceeds. A bond is too late once the event bonded against occurs. Likewise, here, the benefit, fundamental fairness in adjudicatory proceedings -- *i.e.* a "level playing field" -- is lost if not immediately vindicated.

An examination of the type of issues in civil cases which have satisfied the requirements of the collateral order doctrine reveals that they are frequently questions whose resolution is fundamental to the further conduct of the litigation, in particular, the ground rules and underlying conditions or the "rules of engagement" which will define the context of the case. *Gillespie v. U.S. Steel Corp.* 85 S.Ct 308, 379 U.S. 148 (1964)(an order striking portions of the complaint which added claims under state law and striking all references in the complaint to recovery for the benefit of relatives of the decedent other than his mother was appealable); *see also Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950) (an order vacating an attachment in admiralty is appealable, although an order sustaining an attachment is not); *Roberts v. U.S. Dist. Court*, 339 U.S. 844 (1950) (denial of a petition to proceed *in forma pauperis* was appealable); *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 169-172 (1974) (an order imposing on the defendants 90% of the costs of notifying members of a class was appealable).

This case, too, asks 'what are the rules of engagement?' Indeed, it presents a seminal question about how the adjudicatory aspect of administrative agencies functions. Without collateral order appeal, Bechtel will be deprived of the due process right to fair proceedings and the system itself will continue to suffer.

CONCLUSION

For the reasons stated above, Bechtel Energy Corporation prays that its Petition for Writ of Certiorari be granted.

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APPENDIX A

U.S. COURT OF APPEALS
FILED
DECEMBER 18, 1995
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60606

BECHTEL ENERGY CORPORATION,
Petitioner,

versus

ROBERT B. REICH, Secretary,
Respondent.

Petition for Review of an Order of the
U.S. Department of Labor

Before KING, SMITH and BENAVIDES, Circuit Judges.

BY THE COURT:

IT IS ORDERED that respondent's motion to dismiss the petition for review is **GRANTED**.

IT IS FURTHER ORDERED that petitioner's motion to supplement its response to respondent's motion to dismiss, seven (7) days from the filing of the record, is DENIED AS MOOT.

IT IS FURTHER ORDERED that respondent's motion to defer the filing of the record is DENIED AS MOOT.

APPENDIX B

U.S. DEPARTMENT OF LABOR
SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: September 12, 1995
CASE NO. 88-ERA-9

IN THE MATTER OF

JOHN A. CORDER
COMPLAINANT,

v.

BECHTEL ENERGY CORPORATION,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

REMAND ORDER

On Feb. 9, 1994, the Secretary disapproved a settlement between the parties in this case arising under the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988 & Supp. IV 1992), and remanded the case to the Administrative Law Judge for further proceedings. Although the Secretary had never approved the settlement, Respondent had paid Complainant $67,500 as provided in the settlement.

The ALJ issued a Recommended Order of Dismissal on Aug. 30, 1994, recommending that this case be dismissed for lack of prosecution because Complainant did not comply with the ALJ's earlier order to return the proceeds of the

settlement before proceeding to a hearing. For the reasons discussed in *Macktal v. Brown & Root, Inc.*, Case No. 86-ERA-23, Sec. Dec. Jul. 11, 1995, slip op. at 2-8, I reject the ALJ's recommendation and this case is REMANDED for further proceedings consistent with this order and the order of Feb. 9, 1994.

SO ORDERED.

/s/
Secretary of Labor

Washington D.C.

APPENDIX C

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005
(504) 589-6201

DATE: AUG 30 1994
CASE NO.: 88-ERA-9

IN THE MATTER OF:

JOHN A. CORDER,
Complainant,

v.

BECHTEL ENERGY CORPORATION,
Respondent.

RECOMMENDED ORDER OF DISMISSAL

Came on this date to be considered the Order Granting Respondent's Motion to Stay Proceedings entered July 12, 1994. For the reasons contained in that Order, the Court remains of the opinion that Complainant is not entitled to further proceedings in connection with this case since restitution has not been made.

It is therefore, **ORDERED, ADJUDGED and DECREED** that this case is hereby **DISMISSED WITH PREJUDICE** for lack of prosecution.

Entered this 30th day of August, 1994, at Metairie, Louisiana.

/s/ James W. Kerr, Jr.
JAMES W. KERR, JR.
Administrative Law Judge

JWK:mpb

APPENDIX D

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005
(504) 589-6201

DATE: JUL 12 1994
CASE NO.: 88-ERA-9

IN THE MATTER OF:

JOHN A. CORDER,
Complainant,

v.

BECHTEL ENERGY CORPORATION,
Respondent.

ORDER GRANTING RESPONDENT'S MOTION TO STAY PROCEEDINGS

On the 17th of May, 1994, a hearing was held in Houston, Texas on Respondent's Motion to Stay Proceedings Pending Return of Settlement Monies. Respondent filed a brief June 12, 1994. Complainant also filed its brief June 11, 1994. The briefs have been considered prior to the entry of this Order.

The Secretary's February 9, 1994 Order disapproved the prior settlement (hereinafter the "Agreement") and no party has an enforceable obligation under that agreement.

Accordingly, the parties are in the same position they were prior to their execution of the Agreement in October, 1988, with one important exception --Complainant continues to enjoy the benefit of settlement monies which he has not earned and has no right to possess.

Irrespective of the enforceability of the Agreement, if Complainant wishes to continue with this claim he must return the $67,500.00, with interest from February 9, 1994, and restore the parties to the status *quo ante*.

Respondent conferred a benefit of $67,500.00 upon Claimant in exchange for a full and final settlement of this claim and release of all claims against Bechtel Energy Corporation. Although Respondent paid Complainant the money and performed all of its duties under the Agreement, it did not receive the dismissal of this case that both parties had contemplated. Where one has been unjustly enriched by the receipt of a benefit to which he is not entitled, equity will intervene to restore the benefit to its rightful owner. *See Klein v. Jones*, 980 F.2d 521, 527 (8th Cir. 1992) (equitable doctrine of unjust enrichment prohibits one from unfairly profiting at the expense of another); *Hercules, Inc. v. Pages*, 814 F.Supp. 74, 80 (M.D. Fla. 1993) (unjust enrichment occurs where a benefit is conferred upon and retained by a defendant under circumstances where it would be inequitable for him not to pay for it). *See also Harker Heights v. Sun Meadows Land*, 830 S.W.2d 313, 319 (Tex. App. 1992) ("principle of unjust enrichment suggests that restitution is an appropriate remedy in circumstances where the agreement contemplated is unenforceable, impossible, not fully performed, thwarted by mutual mistake or void for other legal reasons."). Under the circumstances, Respondent is entitled to the return of its money. *See generally Restatement of Restitution*, §1 (1937) ("a person who has

been unjustly enriched at the expense of another is required to make restitution to the other".[1]

The parties entered into the Agreement for the purpose of disposing of Complainant's claim. The Agreement stated that the parties desired to resolve their dispute and that Complainant wished to withdraw his claim. Respondent made the $67,500.00 settlement payment upon the execution of the stipulated dismissal.

Where a fundamental purpose of an agreement is frustrated by a mistake of the parties, any benefit conferred under the agreement must be returned. In this respect the Restatement of Restitution provides that:

> [A] person is entitled to restitution for a benefit which he has conferred upon another as the whole or part of his performance of a contract with another, under the erroneous belief induced by a mistake of law, either shared by both or known to the other that the manifested basic purpose of the contract can be carried out or is thereby achieved.

Restatement of Restitution, §48 (1937). Similarly, the Restatement of Contracts provides that restitution is proper where the underlying purpose of a contract is frustrated by changed circumstances, the nonexistence of which was a fundamental assumption of the parties. *Restatement (Second) of Contracts*, §265 (where principal purpose of contract is

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[1] It is well established that restitution awards include prejudgment interest. *See Union Bank of Benton v. First National Bank*, 677 F.2d 1074, 1077-78 (5th Cir. 1982) (under Texas law, equitable grounds underlying remedy of restitution broadens scope of recovery; award of prejudgment interest proper). *See generally Restatement of Restitution*, §156 (duty to pay interest arises if the benefit was a sum certain and payment is necessary to avoid injustice).

frustrated through no fault of party by event, nonoccurrence of which was basic assumption, party's duties are discharged) and §276 (where contracting parties' duties under contract did not arise due to frustration of purpose, party is entitled to return of any benefit conferred). *Cf. Sun Meadows Land*, 830 S.W.2d at 319 (restitution proper remedy in cases of impossibility).

It is well established that an intervening judicial or administrative decision may frustrate the underlying purpose of a contract or render its performance impossible. *Ashland Oil & Refining Co. v. Cities Service Gas Co.*, 462 F.2d 204, 210 (10th Cir. 1972); *Far West Bank v. Dir., Office of Thrift Supervision*, 787 F.Supp. 952, 960-61 (D. Or. 1962) (legislation frustrated contract where nonoccurrence of interference occasioned by legislation was basic assumption of the parties); *Consumers Power Co. v. Nuclear Fuel Services, Inc.*, 509 F.Supp. 201, 210 (W.D.N.Y. 1981) (generally, contractual duty is discharged where performance is subsequently prevented by subsequent administrative order). *See generally* 6 *Corbin on Contracts* §1346 (1962).[2]

In *Far West Federal Bank*, private investors entered into a conversion agreement with the Federal Home Loan Bank Board to recapitalize a failed thrift institution. Under the conversion agreement FHLBB agreed to forbear from enforcing certain capitalization requirements against the thrift institution. FHLBB further agreed that a ten year business

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[2] Texas law provides that, where one pays money to another in anticipation of an agreement which fails to materialize, equity requires that the money be returned. *King v. Tubb*, 551 S.W.2d 436, 442-443 (Tex. App. 1977); *Acoustical Screens*, 524 S.W.2d 346, 350 (Tex. App. 1975). In light of the Secretary's conclusion that no agreement existed for purposes of dismissal until he approved the Agreement, return of the money is appropriate in the present case.

plan under which the thrift institution would operate would be deemed to be in compliance with regulatory capital requirements for all purposes notwithstanding subsequent regulatory changes. Subsequent to the execution of the conversion agreement, Congress passed FIRREA and the Office of Thrift Supervision promulgated regulations pursuant to that statute. OTS then disapproved the conversion agreement, finding that it was not in compliance with its new regulatory capital requirements. 787 F.Supp. at 955-956.

The investors brought suit contending that they were entitled to the return of their investment based upon the frustration of purpose doctrine. The Court agreed, holding that the passage of FIRREA abrogated key provisions of the conversion agreement and thereby frustrated the contract's fundamental purpose. The Court found that the nonoccurrence of events which would preclude the government from honoring its obligations was a basic assumption of the parties. Accordingly, the Court found that the investors were entitled to the return of their investment. *Id.* at 961.

The same principles of equity and justice which require Complainant to return Respondent's funds preclude him from proceeding with this action until he does so. It is well established that a party to a settlement agreement may not escape his obligations thereunder while at the same time retaining the contract benefits. *See Grillet v. Sears Roebuck & Co.*, 927 F.2d 217, 220 (5th Cir. 1991) (plaintiff who executed release agreement for payment could not simultaneously retain benefit of agreement and escape obligations it imposed); *Mustang Beach Development Corp. v. Fidelity & Gas Co.*, 348 F.Supp. 1270, 1272 (S.D. Tex. 1972), *aff'd without opinion*, 463 F.2d 1138 (5th Cir. 1973) (it is a well-settled rule in equity that one who seeks to avoid an obligation must return consideration paid) (following

Texas law); *Mungin v. Florida East Coast Railway Co.*, 318 F.Supp. 720, 735 (M.D. Fla. 1970), *aff'd without opinion*, 441 F.2d 728 (5th Cir. 1971) (justice required that for settling party to be relieved of settlement obligation he must restore the *status quo ante* by returning settlement payment). *See also Kirby v. Dole*, 736 F.2d 661, 663-64 (11th Cir. 1984) (plaintiff who agrees to settle action cannot subsequently seek to retain the benefit of the agreement while continuing to press the claim he agreed to settle). As Texas courts have held:

> It is a familiar rule of equity that "He who seeks equity must do equity." Thus it is held that one seeking a cancellation of an instrument, with certain exceptions not pertinent here, must restore the original status; he cannot repudiate the instrument and retain the benefits thereunder received.

Guion v. Guion, 475 S.W.2d 856, 869 (Tex. App. 1971) (plaintiff ratified settlement by retaining consideration) (quoting *Texas Company v. State*, 281 S.W.2d 83 (Tex. 1955).

In *Grillet*, for example, plaintiff sued her former employer for wrongful termination under the Age Discrimination in Employment Act. The employer moved for summary judgment on the basis of a release plaintiff had executed at the time of her termination. The district court denied the motion, however, noting that the plaintiff had raised factual issues concerning the validity of the release.

Reversing, the Fifth Circuit found that irrespective of any claim of fraud or duress in connection with the execution of the release, plaintiff had ratified the release by retaining the funds paid in consideration. The Court noted that "[a] party cannot be permitted to retain the benefits received

under a contract and at the same time escape the obligations imposed by the contract." 927 F.2d at 220. In order to prosecute her ADEA case, the Court held that plaintiff should have offered unconditionally to return the full amount paid by the employer with interest as soon as she learned of the facts upon which she based her claims of fraud and duress. Having failed to do so, plaintiff ratified the release. *Id. See also Wamsley v. Champlin Refining & Chemicals, Inc.*, 1993 U.S. App. LEXIS 34091 *22, 63 Fair Empl. Prac. Cas. (BNA) 821 (5th Cir. December 30, 1993) (Justice and equity require employee who seeks to avoid obligation under settlement agreement to return money received).

The question as to whether Complainant's refusal to return the prior settlement pay constitutes a ratification is not being addressed. However, it appears to this Court that it is grossly unfair for Complainant to be allowed to proceed with this litigation while retaining the benefit which had been conferred for the purpose of avoiding litigation. Such prosecution would be for the primary purpose of attempting to obtain greater benefits without risk. Further, Respondent would have to incur additional costs and could have difficulty collecting if it is ultimately determined that Complainant is entitled to less. If Complainant has confidence in the merits of this claim, he should be prepared to go to trial in the same position as any other plaintiff and without the unjust enrichment he is attempting to retain.

A similar conclusion was reached in *Gregory v. Garrett Corp.*, 589 F.Supp. 296 (S.D.N.Y. 1984). In *Gregory*, the estates of several air crash victims brought suit for damages against an aviation company ("TGA") and others. TGA alleged each of the estates had released TGA from liability for any tort claims arising out of the crash in return for payments of $250,000.00 to each estate. In the first phase of the bifurcated trial, the jury found that the

releases had been obtained through fraud or misrepresentation. Thereafter, TGA moved to the district court to order the plaintiffs to return the consideration paid for the releases before allowing plaintiffs to proceed with the second phase of the trial. *Id.* at 298-99.

The Court granted the motion. Though noting that under New York law (which the Court found to apply to procedural issues) it was not necessarily required to order the return of the release money prior to the second phase of trial, the Court nevertheless held that various equitable considerations required that the money be returned. The Court noted, for example, that the plaintiffs had accepted the release payments in order to recover money immediately, rather than enduring a trial and a appeal. To allow plaintiffs to retain the funds while proceeding to trial, the Court found, would afford them a benefit to which they were not entitled. *Id.* at 301. Additionally, the court found that it would be "distinctly unfair for plaintiffs to retain the money while proceeding with the action, since plaintiffs might seek to retain the funds if they failed to obtain a judgment in their favor or received a judgment for less than the release amount. Such a result would effectively relieve the plaintiffs of all risk in the action. *Id.* Finally, the Court noted that there was no guaranty the plaintiffs would receive judgments of $250,000.00 or more from which the release awards could be subtracted. *Id.*

It is, therefore, **ORDERED, ADJUDGED and DECREED** that Respondent's Motion to Stay Proceedings is, in all things, **GRANTED.**

It is further **ORDERED** that Complainant shall, within 90 days of the hearing conducted May 17, 1994, repay Respondent $67,500.00, plus interest, from February 9, 1994, at the rate provided by 28 U.S.C. §1961.

It is further **ORDERED** that if Complainant fails to submit to the Court proof by August 17, 1994, that repayment has been made in accordance with this Order, the Court will recommend to the Secretary of Labor that this case be **DISMISSED** with prejudice for lack of prosecution.

Entered this 12th day of July, 1994, at Metairie, Louisiana.

/s/ James W. Kerr, Jr.
JAMES W. KERR, JR.
Administrative Law Judge

JWK:mpb

APPENDIX E

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: February 9, 1994
CASE NO.: 88-ERA-9

IN THE MATTER OF

JOHN A. CORDER,
COMPLAINANT,

v.

BECHTEL ENERGY CORPORATION,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

ORDER

The administrative law judge (ALJ) in this case arising under Section 210 (the employee protection provision) of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1982), issued a [Recommended][1] Agreed Order of Dismissal with Prejudice (Order of Dismissal) on October 28, 1988. The Order of Dismissal stated that "all matters in and related to this cause have been concluded by compromise and settlement."

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[1] Under 29 C.F.R. § 24.6 of the regulations implementing the ERA, an ALJ is authorized to issue only a recommended decision which must be reviewed by the Secretary before it becomes final.

The Order of Dismissal indicated that the ALJ had reviewed the settlement and then permitted it to be "withdrawn" and retained by counsel for Respondent. A copy of the settlement was not made part of the record at that time. On December 15, 1988, the ALJ issued an Order Sealing Transcript which purported to place the transcript of the proceedings before the ALJ on October 24, 1988, under seal "[i]n order to honor the request of the parties that the terms of the settlement remain confidential."

On May 25, 1989, the Secretary issued an Order to Submit Settlement which noted that a case under the ERA cannot be dismissed on the basis of a settlement unless the settlement has been reviewed to determine whether it is fair, adequate and reasonable, and that there was a serious question whether an ALJ or the Secretary has the authority under the ERA to seal the transcript of a hearing. The Order to Submit Settlement ordered the parties to submit a copy of the settlement agreement and gave the parties an opportunity to submit briefs on whether the Secretary has the authority under the ERA to seal all or any portion of the record.

Complainant wrote a letter to the Secretary on June 24, 1989, stating that he "was forced to sign [the] agreement with [Bechtel] against my will and moral convictions due to the pressures put on me by my attorney . . . ." A copy of the settlement agreement was attached to Complainant's letter. Complainant also indicated in that letter that he does not concur with the ALJ's order sealing the transcript and requested that the transcript and the settlement be made public. He did not, however, request that the settlement be rejected. On June 29, 1989, Respondent filed a Brief in Support of Authority of Administrative Law Judge James Kerr Re Sealing of Transcript of Hearing Re Settlement (Respondent's brief). The Release and Settlement

Agreement, marked "Sealed," and the sealed transcript were attached to the brief as exhibits.

In its brief in response to the Secretary's May 25, 1989 order, Respondent argued that the Secretary or an ALJ has authority to seal any portion of the record in this case under 29 C.F.R. § 18.56 (1993). That section of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (ALJ Rules of Practice) provides:

> On his or her own motion, or on the motion of any party, the administrative law judge may direct that there be a restricted access portion of the record to contain any material in the record to which public access is restricted by law or by the terms of a protective order entered in the proceedings.

Respondent also argued that disclosure of the settlement would violate 18 U.S.C. § 1905 (1982), which prohibits disclosure by government employees of trade secrets and confidential statistical information. Finally, Respondent argued that it would be inequitable to the parties and would not serve any public purpose to disclose the terms of the settlement. Respondent asserted in this regard that disclosure would invade Complainant's privacy[2] and could prejudice Respondent in its settlement negotiations in other cases, thus generally discouraging settlements.

The Secretary has held in a number of cases with respect to confidentiality provisions in settlement agreements that the FOIA "requires agencies to disclose requested

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[2] This argument would appear to be moot because Complainant stated in his letter of June 24, 1989, that he wants the settlement to be public.

documents unless they are exempt from disclosure . . . ." *Plumlee v. Alyeska Pipeline Service Co.*, Case Nos. 92-TSC-7, 10; 92-WPC-6, 7, 8, 10, Sec'y. Final Order Approving Settlements and Dismissing Cases with Prejudice, Aug. 6, 1993, slip. op at 6. *See also Mitchell v. Arizona Public Service Co.*, Case Nos. 92-ERA-28, 29, 35, 55, Sec'y. Final Order Approving Settlement Agreement and Dismissing Cases, Jun. 28, 1993, slip op. at 2 (request to place settlement agreement under seal denied); *Davis v. Valley View Ferry Authority*, Case No. 93-WPC-1, Sec'y. Final Order Approving Settlement and Dismissing Complaint, Jun. 28, 1993, slip op. at 2 n.1 (parties' submissions become part of record and are subject to FOIA); *Ratliff v. Airco Gases*, Case No. 93-STA-00005, Sec'y. Final Order Approving Settlement Agreement Jun. 25, 1993, slip op. at 2 (same); *Reid v. Tennessee Valley Auth.*, Case No. 91-ERA-17, Sec'y. Order Approving Settlement and Dismissing Complaint with Prejudice, Aug. 31, 1992, slip op. at 3 n.1 (same); *Daily v. Portland Gen'l. Elec. Co.*, Case No. 88-ERA-40, Sec'y. Order Approving Settlement and Dismissing Case, Mar. 1, 1990, slip op. at 1 n.1 (same). The hearing record in this case, including the transcript and the settlement agreement, therefore, are agency records which must be made available for public inspection and copying under the FOIA.

In the event a request for inspection or copying of the record in this case is made by a member of the public, therefore that request must be responded to as provided in the FOIA. If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no exemption were applicable, the document would have to be disclosed. Since no FOIA request has been made, it would be premature to determine whether any of the exemptions in the FOIA would be

applicable and whether the Department of Labor would exercise its authority to claim such an exemption and withhold the requested information. It also would be inappropriate to decide such questions in this proceeding. Department of Labor regulations provide specific procedures for responding to FOIA requests, for appeals by requestors from denials of such requests, and for protecting the interests of submitters of confidential commercial information. *See* 29 C.F.R. Part 70.

Therefore, the ALJ's order sealing the transcript of the October 24, 1988, hearing in this case is reversed, and the record in this case shall be available for inspection and copying in accordance with the FOIA and the procedures in 29 C.F.R. Part 70.

The Release and Settlement Agreement (Agreement) in this case has been reviewed and, for the reasons discussed below, I reject it and this case will be remanded to the ALJ for further proceedings consistent with this order. [3]

Under paragraph 5 of the Agreement, Complainant "agrees to withdraw and forever cease his participation in the [Nuclear Regulatory Commission] Proceeding and the [Public Utilities Commission] Proceeding." Under paragraph 6, Complainant agrees, except as "required by law," not to make any "disclosure, comment or other communication concerning . . . any and all claims, allegations, or assertions, of whatever description . . . regarding or related to [the

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[3] Paragraphs 1, 3, and 4, appear to encompass the settlement of matters arising under various laws, only one of which is the ERA. For the reasons set forth in *Poulos v. Ambassador Fuel Oil Co.*, Case No. 86-CAA-1, Sec. Order, November 2, 1987, slip op. at 2, I have limited my review of the agreement to determining whether its terms are a fair, adequate and reasonable settlement of Complainant's allegations that Respondent violated the ERA.

South Texas Nuclear Plant], including [Complainant's] employment at [the South Texas Nuclear plant] and its termination, and the design, engineering, construction, materials, equipment, safety, maintainability, operability, viability, prudence, or personnel associated with the [South Texas Nuclear Plant]."

Paragraph 6 of the Agreement in this case would prohibit Complainant, among other things, from providing information to, or assisting or cooperating with, the Department of Labor in investigations of complaints against Respondent or involving the South Texas Nuclear Plant under the ERA or any other environmental whistleblower protection statute. Paragraph 6 also would prohibit Complainant from providing information or assisting or cooperating with the Department of Labor or any other federal or state agency in the investigation or prosecution of any charge of discrimination or wrongful employment practices, in violation of any federal or state law, rule, or regulation. This could include, for example, the Fair Labor Standards Act, the Occupational Safety and Health Act, Executive Order No. 11,246, Section 503 of the Rehabilitation Act of 1973, and Title VII of the Civil Rights Act of 1964. This provision appears to prohibit Complainant from voluntarily testifying or otherwise participating in any proceeding or investigation involving the South Texas Nuclear Plant, including Nuclear Regulatory Commission licensing or safety proceedings or investigations, and state regulatory or rate proceedings or investigations. This prohibition also could include investigation or enforcement proceedings by the United States Environmental Protection Agency. The only exception to these restrictions would be where Complainant is "required by law to respond to any inquiries, subpoenas, and other legal process . . . ." Agreement, Para. 6(b).

I find that these provisions of the Agreement would have the effect of drying up channels of information for the Department of Labor in ERA cases and under other laws, as well as for other agencies in carrying out their responsibilities. Although I note that the NRC has directed all licensees and contractors to notify complainants who are parties to settlement agreements which restrict the right of the complainant to provide information to the NRC that such provisions will not be enforced, NRC directive of April 27, 1989 (copy attached), the restrictions of paragraph 6 here are considerably broader. See discussion above. Although Secretaries of Labor have in the past found such provisions of settlement agreements void as against public policy, severed those provisions and approved the remainder of the agreement, *see, e.g., Polizzi v. Gibbs & Hill, Inc.*, Case No. 87-ERA-38, Sec. Order Rejecting in Part and Approving in Part Settlement Submitted by the Parties and Dismissing Case, July 18, 1989, slip op. at 5-7, the Fifth Circuit has held that the Secretary has no authority to alter the terms of a settlement agreement reached by the parties. *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1154-56 (5th Cir. 1991). The Secretary may either approve or disapprove the agreement as written, and if he disapproves the agreement he may negotiate a new settlement or remand the matter for a hearing. *Id.* at 1156.

Accordingly, for the reasons discussed above with respect to paragraph 6 of the Agreement, I find I cannot enter into this settlement and I reject it. This case is REMANDED to the ALJ for further proceedings consistent with this order.

SO ORDERED.

/s/
Secretary of Labor

Washington, D.C.

APPENDIX F

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: July 11, 1995
CASE NO.: 86-ERA-23

IN THE MATTER OF

JOSEPH J. MACKTAL, JR.
COMPLAINANT,

v.

BROWN & ROOT, INC.,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

ORDER

Under a settlement agreed to by the parties, Respondent paid Complainant $35,000 for, among other things, discharge of all claims and dismissal of this case. Numerous issues were raised by the parties concerning the effect and validity of the settlement. After tortuous litigation, *see Macktal v. Secretary of Labor*, 923 F.2d 1150, 1152-53 (5th Cir. 1991), the Secretary, exercising her limited authority regarding settlements, *Macktal* at 1154, refused to enter into the settlement because it included a term which the

Secretary found against public policy.[1] She remanded this case to the Administrative Law Judge "for further proceedings consistent with [the Secretary's] order and the ERA." The ALJ recommended dismissal because Complainant failed to comply with his order directing Complainant to repay the $35,000 before proceeding to a hearing. The parties have filed briefs in support of and in opposition to the ALJ's recommendation.

The ALJ engaged in a lengthy discussion of the equitable principles of unjust enrichment and restitution in contract law. Order Granting Respondent's Motion to Stay Proceedings at 2-5. He noted that "[w]here one has been unjustly enriched by the receipt of a benefit to which he is not entitled, equity will intervene to restore the benefit to its rightful owner." *Id.* at 2. The ALJ concluded that"[t]he principles of equity and justice which require Complainant to return Respondent's funds preclude him from proceeding with this action until he does so." *Id.* at 4. Complainant's failure to comply with the ALJ's order to repay the money, the ALJ held, justifies dismissal of this case. The ALJ apparently assumed, without discussion, that the Secretary possesses powers under the ERA comparable to those of a court of equity. *Id.* at 4-6. After careful consideration, I conclude that the Secretary's powers under the ERA are more limited and I will remand this case to the ALJ for a hearing.

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[1] The Fifth Circuit held that resolution of ERA cases by agreement "is a consensual settlement process involving all three parties," that is, Complainant, Respondent and the Secretary, and that the Secretary may either approve a settlement as written or reject it. *Macktal v. Brown & Root*, 923 F.2d at 1154-55. When Respondent paid Complainant the $35,000, the Secretary had not taken action on the settlement and later disapproved it, as described above.

Both parties recognized in their briefs that the crucial issue here is whether the Secretary has the authority to order Complainant to return the settlement money. Not surprisingly, each party urges opposing views of the Secretary's powers under the ERA. Complainant points out that administrative agencies are creatures of statute and may not take any action not authorized by or in violation of statutory mandate.[2] Certainly, no explicit language in the ERA authorizes the order entered by the ALJ. But Respondent argues, with some support, that agencies have considerable latitude in interpreting and applying statutes they administer.

I find that, in the absence of a broad delegation of rulemaking authority, neither an ALJ nor the Secretary had the power to enter such an order.[3] *See Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973) ("[w]here the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,'[Section 105 of the Truth in Lending Act, 15 U.S.C. § 1604 (1988)] we have held that the validity of a regulation

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[2] I note that *FTC v. Eastman Kodak Co.*, 274 U.S. 619 (1927), cited by Complainant as the progenitor of a "long line of cases" restricting administrative agencies to their explicitly granted powers, "has been repudiated." *FTC v. Dean Foods, Inc.*, 384 U.S. 597, 607 N.4 (1966).

[3] Although the issue here is whether the Secretary has the authority to order repayment of the settlement proceeds in the context of an adjudicatory proceeding, rather than by regulation, the Supreme Court has held that a "unitary agency," one combining policymaking, legislative and adjudicatory powers, may use adjudication to engage in lawmaking and policymaking where it has been delegated powers to make law and policy through rulemaking and necessarily interprets the rules it promulgates. *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 153 (1991)

promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'") (footnote and citations omitted); *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (when statute is silent or ambiguous [42 U.S.C. § 7502(b) (6)], courts should defer to agency's interpretation if it is a "permissible construction of the statute.")

Lower courts have upheld agency regulations not explicitly authorized by statute but based on a broad grant of rulemaking authority in a number of situations, including the following:

* where "they facilitate, in a reasonable manner, its effective implementation," *Alexander v. Trustees of Boston Univ.*, 766 F.2d 630, 639 (1st Cir. 1985) (upholding regulation, issued under 50 U.S.C. app. § 462(f) (4), requiring educational institutions to ask applicants for financial aid if they have registered for draft as reasonable implementation of statute denying aid to those required to register who had not done so);

* *Oceanair of Florida, Inc. v. U.S. Dep't of Transp.*, 876 F.2d 1560, 1565 (11th Cir 1989) (upholding regulatory presumption, established under 49 U.S.C. app. § 1354(a), of unfitness of dormant air carrier where agency has concluded rule "is necessary to perform its statutorily-mandated regulatory responsibilities unless Congress has explicitly [restricted its authority]," (paraphrasing *United States v. Storer Broadcasting, Co.*, 351 U.S. 192, 203 (1956));

* *Touche Ross & Co. v. SEC*, 609 F.2d 570, 579 (2d Cir. 1979) (upholding SEC regulations, issued under 15 U.S.C. § 78 (w) (a) (1), establishing procedures for disciplining and disbarring accountants and attorneys from practicing before SEC where regulation is "legitimate reasonable and direct adjunct to the [agency's] explicit statutory power") (quoting *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 655 (1978), internal quotes omitted);

* *Dir., Office of Wkrs. Comp. Prog. v. National Mines Corp.*, 554 F.2d 1267, 1275 (4th Cir. 1977) (upholding regulation, issued under 30 U.S.C. § 936(a), appointing hearing officers who were not administrative law judges to try black lung claims where regulation "is reasonably related to" purposes of the enabling legislation).

A broad grant of rulemaking power has been described as "a kind of necessary and proper clause [which] grants considerable powers to enforce the substantive mandates of federal law . . . but is tied to and limited by those provisions." *Central Forwarding, Inc. v. I.C.C.*, 698 F.2d 1266, 1277 (5th Cir. 1983). The Fifth Circuit held in *Central Forwarding* that the "enormous powers" granted by Congress to the I.C.C. to regulate the interstate transportation industry, 49 U.S.C. § 10321(a), did not include authority to regulate compensation paid by carriers to owner-operators. *Id.* at 1281.

Congress has not granted broad rulemaking authority to the Secretary under the ERA. Any rule or order issued by the Secretary under the Act, therefore, must be directly related to a specific provision of the statute and clearly necessary to implement express statutory terms. For example, the Secretary has interpreted the 30 day time limit

for filing a complaint under the ERA, 42 U.S.C. § 5851(b)(1),[4] as a statute of limitations subject to waiver, estoppel and equitable tolling, rather than a jurisdictional requirement. *See e.g., Doyle v. Alabama Power Co.*, Case No. 87-ERA-43, Sec. Dec. Sep. 29, 1989, slip op. at 2; *Bonanno v. Northeast Nuclear Energy Co.*, Case Nos. 92-ERA-40 and 41, Sec. Dec. Aug. 25, 1993, slip op. at 7; *Lastre v. Veterans Administration Lakeside Medical Center*, Case No. 87-ERA-42, Sec. Dec. Mar. 31, 1988, slip op. at 3; *cf., School District of the City of Allentown v. Marshall*, 657 F.2d 16, 19 (3d Cir. 1981) (affirming Secretary's interpretation of 30 day time limit in Toxic Substances Control Act). Even in this example, where the Secretary was required to interpret a specific statutory term in order to implement the whistleblower laws, the Third Circuit narrowly circumscribed the Secretary's authority, holding that "restrictions on equitable tolling . . . must be scrupulously observed." *Id.* at 19; *see* discussion *id.* at 20-21.

I find no authority in the ERA for me to rectify inequitable bargains or order restitution of monies unfairly retained simply because the parties' dispute concerns, among other things, the whistleblower provision of the ERA.[5] To

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[4] The 30 day time limit was extended to 180 days by the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 42 U.S.C.A. § 5851(b) (1) (West 1994).

[5] I cannot agree with Respondent's assertion that, absent an express or clearly implied delegation of power by Congress, administrative agencies can routinely exercise equitable powers. In *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 160 (D.C. Cir. 1967), cited by Respondent as authority for that proposition, the court held that the FPC "did not suppose it had a broad equity charter," but only referred to equitable principles to show that "its course was reasonable." In contrast, the overpayment recovery provisions of the

begin with, no agreement cognizable under the Act settling Complainant's ERA claim has ever been reached because the Secretary never approved it. 42 U.S.C. § 5851(b) (2) (A) (proceeding may be terminated "on the basis of a settlement *entered into by the Secretary* and the person alleged to have committed [the] violation . . . [with the] participation and consent of the complainant;" *Macktal v. Secretary of Labor*, 923 F.2d at 1153-54 (emphasis added) (statutory language only authorizes three options, one of which is a "consensual agreement involving all three parties" and there is no exception for cases in which the complainant and the respondent reach an independent settlement.

In addition, the settlement agreement here released Respondent from any claims by Complainant arising out of his employment with Respondent, his termination from employment in January 1986 and his resignation from his position with Respondent, not just his claim under the ERA. Settlement Agreement ¶ 2; General Release pp. 1-2. The parties have an active dispute pending before me under the ERA which I must resolve as provided in the Act. I have no power to resolve their dispute over an alleged partially performed contract to which I am not a party and which addresses many other matters over which I have no jurisdiction. *Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, Sec. Ord. Nov. 1, 1987, slip op. at 2.

Black Lung Benefits Act under consideration in *Napier v. Dir., Off. of Wkrs. Comp. Progs.*, 999 F.2d 1032, 1034 n. 3 (6th Cir. 1993), explicitly provide that "[t]here shall be no adjustment or recovery of an overpayment in any case [where it would] [b]e against equity or good conscience."

This case is REMANDED to the ALJ for a hearing.

SO ORDERED.

/s/
Secretary of Labor

Washington, D.C.

APPENDIX G

U.S. COURT OF APPEALS
FILED
FEB 19 1996
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60606

BECHTEL ENERGY CORPORATION,
Petitioner,

versus

ROBERT B. REICH, Secretary,
Respondent.

Petition for Review of an Order of the
U.S. Department of Labor

Before KING, SMITH and BENAVIDES, Circuit Judges.
BY THE COURT:

IT IS ORDERED that petitioner's petition for rehearing, treated as motion for reconsideration of the court's order of December 18, 1995, dismissing the appeal, is *denied.*

CBK JS MB
2-13-96

APPENDIX H

42 United States Code § 5851.

§ 5851. Employee protection

(a) Discrimination against employee. (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee)—

(A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

(B) refused to engage in any practice made unlawful by this Act or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this Act or the Atomic Energy Act of 1954;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

(2) For purposes of this section, the term "employee" includes—

(A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021);

(B) an applicant for a license from the Commission or such an agreement State;

(C) a contractor or subcontractor of such a licensee or applicant; and

(D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2201(d), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344.

(b) Complaint, filing and notification. (1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, within 180 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (in this section referred to as the "Secretary") alleging such discharge or discrimination. Upon

receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint, the Commission, and the Department of Energy.

(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding of the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. Upon the conclusion of such hearing and the issuance of a recommended decision that the complaint has merit, the Secretary shall issue a preliminary order providing the relief prescribed in subparagraph (B), but may not order compensatory damages pending a final order. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the

Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(3)(A) The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the investigation required under paragraph (2) unless the complainant has made a prima facie showing that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation required under paragraph (2) shall be conducted if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior.

(C) The Secretary may determine that a violation of subsection (a) has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(D) Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

(c) **Review.** (1) Any person adversely affected or aggrieved by an order issued under subsection (b) may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of title 5 of the United States Code [5 USCS §§ 701 et seq.]. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.

(2) An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

(d) Jurisdiction. Whenever a person has failed to comply with an order issued under subsection (b)(2), the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

(c) Commencement of action. (1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(2) The court, in issuing any final order under this subsection, may award costs of litigation (including

reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(f) Enforcement. Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28 of the United States Code.

(g) Deliberate violations. Subsection (a) shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this Act or of the Atomic Energy Act of 1954, as amended.

(h) Nonpreemption. This section may not be construed to expand, diminish, or otherwise affect any right otherwise available to an employee under Federal or State law to redress the employee's discharge or other discriminatory action taken by the employer against the employee.

(i) Posting requirement. The provisions of this section shall be prominently posted in any place of employment to which this section applies.

(j) Investigation of allegations. (1) The Commission or the Department of Energy shall not delay taking appropriate action with respect to an allegation of a substantial safety hazard on the basis of —

(A) the filing of a complaint under subsection (b)(1) arising from such allegation; or

(B) any investigation by the Secretary, or other action, under this section in response to such complaint.

(2) A determination by the Secretary under this section that a violation of subsection (a) has not occurred shall not be considered by the Commission or the Department of Energy in its determination of whether a substantial safety hazard exists.

APPENDIX I

5 United States Code § 554-556

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved —

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except an administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of —

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for —

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply —

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

§555. Ancillary Matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency by other qualified representative. A party is entitled to appear in person or by or with counsel or

other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

§556. Hearings; Presiding Employees; Powers and Duties; Burden of Proof; Evidence; Record as Basis of Decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence —

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating

employee, the agency shall determine the matters as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may —

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rules consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof

cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

APPENDIX J

CODE OF FEDERAL REGULATIONS
TITLE 29 - LABOR
SUBTITLE A - OFFICE OF THE SECRETARY OF LABOR

Part 18 - Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges

Subpart A—General

§ 18.1 Scope of rules.

(a) *General application.* These rules of practice are generally applicable to adjudicatory proceedings before the Office of Administrative Law Judges, United States Department of Labor. Such proceedings shall be conducted expeditiously and the parties shall make every effort at each stage of a proceeding to avoid delay. To the extent that these rules may be inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter is controlling The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation.

(b) *Waiver, modification, or suspension.* Upon notice to all parties, the administrative law judge may, with respect to matters pending before him or her, modify or waive any rule herein upon a determination that no party will be prejudiced and that the ends of justice will be served thereby. These rules may, from time to time, be suspended, modified or revoked in whole or part.

* * *

§ 18.6 motions and requests.

(a) *Generally.* Any application for an order or any other request shall be made by motion which, unless made during a hearing or trial, shall be made in writing unless good cause is established to preclude such submission, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Motions or requests made during the course of any hearing or appearance before an administrative law judge shall be stated orally and made part of the transcript. Whether made orally or in writing, all parties shall be given reasonable opportunity to state an objection to the motion or request.

(b) *Answers to motions.* Within ten (10) days after a motion is served, or within such other period as the administrative law judge may fix, any party to the proceeding may file an answer in support or in opposition to the motion, accompanied by such affidavits or other evidence as he or she desires to rely upon. Unless the administrative law judge provides otherwise, no reply to an answer, response to a reply, or any further responsive document shall be filed.

(c) *Oral arguments or briefs.* No oral argument will be heard on motions unless the administrative law judge otherwise directs. Written memoranda or briefs may be filed with motions or answers to motions, stating the points and authorities relied upon in support of the position taken.

(d) *Motion for order compelling answer: sanctions.* (1) A party who has requested admissions or who has served interrogatories may move to determine the sufficiency of the answers or objections thereto. Unless the objecting party sustains his or her burden of showing that the objection is justified, the administrative law judge shall order that an answer be served. If the administrative law judge

determines that an answer does not comply with the requirements of these rules, he or she may order either that the matter is admitted or that an amended answer be served.

(2) If a party or an officer or agent of a party fails to comply with a subpoena or with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or any other order of the administrative law judge, the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

(i) Infer that the admission, testimony, documents or other evidence would have been adverse to the noncomplying party;

(ii) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the non-complying party;

(iii) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, office or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;

(iv) Rule that the non-complying party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence should have shown.

(v) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

* * *

§ 18.29 Authority of administrative law judge.

(a) *General powers.* In any proceeding under this part, the administrative law judge shall have all powers necessary to the conduct of fair and impartial hearings, including, but not limited to, the following:

(1) Conduct formal hearings in accordance with the provisions of this part;

(2) Administer oaths and examine witnesses;

(3) Compel the production of documents and appearance of witnesses in control of the parties;

(4) Compel the appearance of witnesses by the issuance of subpoenas as authorized by statute or law;

(5) Issue decisions and orders;

(6) Take any action authorized by the Administrative Procedure Act;

(7) Exercise, for the purpose of the hearing and in regulating the conduct of the proceeding, such powers vested in the Secretary of Labor as are necessary and appropriate therefor;

(8) Where applicable, take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts, issued from time to time and amended pursuant to 28 U.S.C. 2072; and

(9) Do all other things necessary to enable him or her to discharge the duties of the office.

(b) *Enforcement.* If any person in proceedings before an adjudication officer disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law, the administrative law judge responsible for the adjudication, where authorized by statute or law, may certify the facts to the Federal District Court having jurisdiction in the place in which he or she is sitting to request appropriate remedies.

APPENDIX K

CODE OF FEDERAL REGULATIONS
TITLE 29--LABOR
SUBTITLE A--OFFICE OF THE SECRETARY OF LABOR
PART 24--PROCEDURES FOR THE HANDLING OF DISCRIMINATION COMPLAINTS UNDER FEDERAL EMPLOYEE PROTECTION STATUTES

s 24.5 Hearings.

(a) Notice of Hearing. The administrative law judge to whom the case is assigned shall within seven calendar days following receipt of the request for hearing, notify the parties by certified mail, directed to the last known address of the parties, of a day, time and place for hearing. All parties shall be given at least five days notice of such hearing. However, because of the time constraints imposed upon the Secretary by the above statutes, no requests for postponement shall be granted except for compelling reasons.

(b) Consolidated Hearings. When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Chief Administrative Law Judge may, upon motion by any party or on his own or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings shall be made and the evidence introduced in one case may be considered as introduced in the others, and a separate or joint decision shall be made, as appropriate.

(c) Place of Hearing. The hearing shall, where possible, be held at a place within 75 miles of the complainant's residence.

(d) Right to Counsel. In all proceedings under this part, the parties shall have the right to be represented by counsel.

(e) Procedures, evidence and record.

(1) Evidence. Formal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence available shall be applied. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitious.

(2) Record of Hearing. All hearings shall be open to the public and shall be mechanically or stenographically reported. All evidence upon which the administrative law judge relies for decision shall be contained in the transcript of testimony, either directly or by appropriate reference. All exhibits and other pertinent documents or records, either in whole or in material part, introduced as evidence, shall be marked for identification and incorporated into the record.

(3) Oral argument; briefs. Any party, upon request, may be allowed a reasonable time for presentation of oral argument and to file a prehearing brief or other written statement of fact or law. A copy of any such prehearing brief or other written statement shall be filed with the Chief Administrative Law Judge or the administrative law judge assigned to the case before or during the proceeding at which evidence is submitted to the administrative law judge and shall be served upon each other party. Post-hearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge and shall be due within the time prescribed by the administrative law judge.

(4) Dismissal for Cause.

(i) The administrative law judge may, at the request of any party, or on his or her own motion, dismiss a claim

(A) Upon the failure of the complainant or his or her representative to attend a hearing without good cause;

(B) Upon the failure of the complainant to comply with a lawful order of the administrative law judge.

(ii) In any case where a dismissal of a claims, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order. After the time for response has expired, the administrative law judge shall take such action as is appropriate to rule on the dismissal, which may include an order dismissing the claim, defense or party.

APPENDIX L

U.S. DEPARTMENT OF LABOR:

Employment Standards Administration
Wage and Hour Division
2320 LaBranch, Room 2101
Houston, TX 77004

January 4, 1988

Certified No. P236640773

Mr. John A. Corder
Route 4, Box 4158
Brazoria, TX 77422

Re: John A. Corder vs.
Bechtel Corporation

Dear Mr. Corder:

This letter is to notify you of the results of our compliance action in the above case. A previous letter from this office advised you that your complaint was received on September 4, 1987, and enclosed a copy of Regulations, 29 CFR Part 24 and a copy of the pertinent sections of the Energy Reorganization Act.

Our initial efforts to conciliate the matter revealed that the parties would not at that time reach a mutually agreeable settlement. An investigation was then conducted. Our investigation did not verify that discrimination was a factor in the actions comprising your complaint. Conversely, it is our conclusion that your allegations are unprovable for the following reasons:

1. Your concern was not related to nuclear safety.

2. Your termination was a result of Bechtel's ongoing reduction in force program in which proper procedure was followed.

This letter will notify you that if you wish to appeal the above findings you have a right to a formal hearing on the record. To exercise this right you must, within five (5) calendar days of receipt of this letter, file your request for a hearing by telegram to:

The Chief Administrative Law Judge
U.S. Department of Labor
Suite 700, Vanguard Building
1111 - 20th Street NW
Washington, D. C. 20036

Unless a telegram request is received by the Chief Administrative Law Judge within the five-day period, this notice of determination will become the final order of the Secretary of Labor dismissing your complaint. By copy of this letter I am advising Bechtel Corporation of the determination in this case and the right to a hearing. A copy of this letter has also been sent to the Chief Administrative Law Judge with your complaint.

It should be made clear to all parties that the role of the Department of Labor is not to represent the parties in any hearing. The Department would be neutral in such a hearing which is simply part of the fact-development process, and only allows the parties an opportunity to present evidence for the record. If there is a hearing, an order of the Secretary shall be based upon the record made at said hearing, and shall either provide appropriate relief or deny the complaint.

Sincerely,

/s/ Daniel K. Brown
Daniel K. Brown
Area Director

cc: Mr. Richard D. Bryan
Field Construction Engineer
Bechtel Corporation
P. O. Box 15
Bay City, TX 77414

Dr. Dale Powers
Enforcement Officer
Nuclear Regulatory Commission, Region VI
611 Ryan Plaza Drive, Suite 1000
Arlington, TX 76011

Supreme Court, U.S.
FILED
JUL 22 1996

No. 95-1889

In the Supreme Court of the United States

OCTOBER TERM, 1995

BECHTEL ENERGY CORPORATION, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the Secretary of Labor's order denying petitioner's motion to dismiss a whistleblower complaint and remanding the case to an administrative law judge for further proceedings is immediately reviewable by the court of appeals as a collateral order under Section 210(c) of the Energy Reorganization Act of 1974, 42 U.S.C. 5851(c) (1988).

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1889

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v.

ROBERT B. REICH, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unreported. The orders of the Secretary of Labor (Pet. App. 2a-3a) and of the administrative law judge (ALJ) (Pet. App. 4a-5a) are unreported. Prior orders of the Secretary and the ALJ (Pet. App. 6a-14a, 15a-21a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1995. A petition for rehearing was denied on February 19, 1996. Pet. App. 30a. The petition for a writ of certiorari was filed on May 20, 1996 (a

Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The employee protection provision of the Energy Reorganization Act of 1974 (ERA) prohibits employers from discharging or otherwise discriminating against "nuclear whistleblowers," *i.e.*, employees who complain about nuclear safety violations. 42 U.S.C. 5851(a) (1988).[1] An employee who believes that he has been discharged or otherwise discriminated against may file a complaint with the Secretary of Labor within 30 days. 42 U.S.C. 5851(b)(1) (1988); see 29 C.F.R. 24.3(d). The ERA requires the Secretary to investigate the alleged violation and notify the complainant and respondent of his initial determination as to whether a violation has occurred. 42 U.S.C. 5851(b)(2)(A) (1988); see 29 C.F.R. 24.4(a)-(d)(1). A party dissatisfied with that determination may request a hearing before an ALJ. 42 U.S.C. 5851(b)(2) (A) (1988); 29 C.F.R. 24.4(d)(2)-(3), 24.5. After the hearing, the ALJ must issue a recommended decision. 29 C.F.R. 24.6(a), That decision is then transmitted with the record to the Secretary, who must issue a final order. 29 C.F.R. 24.6(a) and (b). Unless the administrative pro-

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[1] The ERA was amended in 1992, but because the complaint in this proceeding was filed before the amendments' enactment, the pre-amendment version of the Act applies to this case. See 42 U.S.C. 5851 note (providing that the amendments shall apply to claims filed on or after their October 24, 1992, effective date). Although the differences in the two versions of the Act have no effect on the question of appellate jurisdiction presented in this case, we note that petitioner incorrectly relies on the amended version of the Act, Pet. 16-17, and reprints that version in its appendix, Pet. App. 31a-37a.

ceeding is terminated by the Secretary on the basis of a settlement agreed to by the Secretary, the person alleged to have committed the violation, and the complainant, the Secretary must issue an order either providing the relief prescribed by the ERA or denying the complaint.[2] 42 U.S.C. 5851(b)(2)(A) (1988); see 29 C.F.R. 24.6(b) (final order). "Any person adversely affected or aggrieved" by an order of the Secretary "may obtain review of the order" by timely filing a petition for review in the court of appeals for the circuit in which the violation allegedly occurred. 42 U.S.C. 5851(c)(1) (1988); see 29 C.F.R. 24.7.

2. John Corder, a former employee of petitioner Bechtel Energy Corporation, filed a complaint with the Department of Labor (DOL) alleging that petitioner constructively discharged him for whistleblowing activities protected by the ERA. Pet. 2. Dissatisfied with the determination by the DOL's Wage and Hour Division that no violation had occurred, Pet. App. 53a-55a, Corder requested a hearing before a DOL ALJ. Pet. 3. In 1988, before a hearing was held, petitioner and Corder entered into a settlement agreement under which petitioner agreed to pay Corder $67,500 in exchange for release of all claims against petitioner, including claims arising under laws other than the ERA.[3] Pet. App. 7a, 19a n.3.

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[2] If a violation is found, the Secretary may require abatement of the violation, order reinstatement with back pay, award compensatory damages, and/or require the violator to pay the employee's costs and attorney's and expert witness fees. 42 U.S.C. 5851(b)(2)(B) (1988); 29 C.F.R. 24.6(b)(2) and (3).

[3] Corder had filed a state court action against petitioner, which was also resolved by the settlement agreement. Release and Settlement Agreement at 2, 8; see Pet. App. 28a.

Based upon the settlement agreement, the ALJ issued an order recommending that Corder's ERA claim be dismissed with prejudice. *Id.* at 15a. Petitioner, "assuming [that] the Secretary would approve the settlement agreement," thereupon paid Corder $67,500 in conformance with the agreement. Pet. 3.

3. In 1994, the Secretary rejected the settlement agreement between petitioner and Corder because it contained confidentiality provisions he deemed to violate public policy. Pet. App. 15a-21a. Although the Secretary in the past had severed similar provisions from settlement agreements and enforced the remainder of those agreements, the Fifth Circuit in *Macktal* v. *Secretary of Labor*, 923 F.2d 1150 (1991), disapproved that practice, holding that the Secretary must either approve the agreement as written, or, if unable to do so, negotiate a new agreement or remand the matter for a hearing. Following the Fifth Circuit's decision in *Macktal*, the Secretary ruled that because he could not enter into the settlement with the confidentiality provisions, the case should be remanded to the ALJ for further proceedings. Pet. App. 21a.

4. On remand, no new settlement was negotiated, and Corder did not return the $67,500 he had received under the earlier agreement. Pet. 5. Petitioner then moved to stay proceedings before the ALJ until Corder repaid the money. *Ibid.*; Pet. App. 6a. After a hearing, the ALJ granted petitioner's motion. Although he recognized that there was no enforceable settlement agreement between the parties, *id.* at 6a, the ALJ observed that petitioner had "paid [Corder] the money and performed all of its duties under the Agreement, [but] * * * did not receive the dismissal of this case that both parties had contemplated," *id.*

at 6a-7a. Citing principles of unjust enrichment and restitution, the ALJ determined that petitioner was entitled to the return of its money. *Id.* at 7a-10a. He concluded that those "same principles of equity and justice * * * preclude [Corder] from proceeding with this action" until he returns the funds. *Id.* at 10a. He therefore ordered Corder to refund the money, plus interest, within 90 days following the hearing, subject to the sanction of a recommended order of dismissal with prejudice if Corder failed to do so. *Id.* at 13a-14a.

When the date for payment passed, the ALJ issued an order recommending that Corder's complaint be dismissed with prejudice for failure to prosecute, stating that Corder "is not entitled to further proceedings in connection with this case since restitution has not been made." Pet. App. 4a.

5. The Secretary, relying on his decision in *Macktal* v. *Brown & Root, Inc.*, Case No. 86-ERA-23 (DOL July 11, 1995) (Pet. App. 22a-29a),[4] rejected the ALJ's recommended order of dismissal and remanded the case for further proceedings. Pet. App. 2a-3a. The Secretary ruled in *Macktal*, under circumstances virtually identical to those of this case, that he is without authority to condition the availability of a hearing under the ERA on the complainant's return of settlement proceeds.[5] Noting that "no explicit

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[4] The Secretary issued that decision on remand to the agency of the *Macktal* case decided by the Fifth Circuit, discussed at page 4, *supra*.

[5] The facts of *Macktal* closely parallel those of this case. As in the instant case, the complainant in *Macktal* had received a sum of money to settle his ERA claim, as well as other claims, pursuant to an agreement that the Secretary later rejected. Pet. App. 28a. After the Secretary disapproved the settlement, the ALJ on remand "recommended dismissal because

language in the ERA authorizes the [dismissal] order entered by the ALJ," the Secretary concluded in *Macktal* that "neither an ALJ nor the Secretary ha[s] the power to enter such an order." *Id.* at 24a. In so ruling, the Secretary emphasized that there was "no agreement cognizable under the Act * * * because the Secretary never approved it," and that the agreement resolved other claims, over which the Secretary lacked jurisdiction, in addition to the ERA claim. *Id.* at 28a. There was, the Secretary reasoned, nothing in the ERA that empowered him "to rectify inequitable bargains or order restitution of monies unfairly retained simply because the parties' dispute concerns, among other things, the whistleblower provision of the ERA." *Id.* at 27a. Because he lacked "power to resolve [the parties'] dispute over an alleged partially performed contract to which [he was] not a party," *id.* at 28a, the Secretary concluded that neither he nor the ALJ was authorized to order restitution of the settlement money or to order dismissal of the complaint for failure to comply with such an order.

6. Petitioner sought review of the Secretary's order in the court of appeals, and the Secretary moved to dismiss on the ground that the court of appeals lacked jurisdiction. The Secretary argued that his order remanding for further proceedings was not a reviewable final order under 42 U.S.C. 5851(c) (1988), and that, under *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 114 S. Ct. 1992 (1994), it did not qualify

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[the] Complainant failed to comply with his order directing [the] Complainant to repay [the settlement proceeds] before proceeding to a hearing." *Id.* at 22a-23a. Thus, contrary to petitioner's contention (Pet. 9), *Macktal* does not materially differ from this case.

as an immediately reviewable collateral order. The court of appeals, without opinion, granted the Secretary's motion and dismissed the petition for review. Pet. App. 1a.

ARGUMENT

The bulk of the petition (Pet. 6-21) challenges the Secretary's ruling that he is without authority to dismiss a whistleblower complaint under the Energy Reorganization Act because the complainant failed to disgorge money he received under a settlement agreement disapproved by the Secretary. The court of appeals, however, did not reach that issue, in light of its ruling that it lacked jurisdiction to review the Secretary's nonfinal order remanding this proceeding to an ALJ for a hearing. Indeed, the sole question the petition presents for this Court's review is whether the court of appeals erred in holding that the Secretary's order was not appealable. Pet. i. The court of appeals' summary order dismissing the petition for review of the Secretary's nonfinal order is correct. Moreover, the court's ruling does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioner's contention (Pet. 22-25) that the Secretary's order remanding the case for further proceedings before the ALJ is an immediately reviewable collateral order is foreclosed by this Court's decision in *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 114 S. Ct. 1992 (1994).[6] The collateral

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[6] Petitioner does not dispute that only final orders are reviewable under 42 U.S.C. 5851(c) (1988) or that the Secretary's remand order lacks finality because it fails to terminate the litigation. See *Bell* v. *New Jersey*, 461 U.S. 773, 778

order doctrine represents a "practical" construction of the concept of finality under which, in certain circumstances, a "narrow class of decisions that do not terminate the litigation" may nonetheless be reviewed as final orders. *Id.* at 1995. An order falls within this narrow class only if it conclusively determines a disputed question that is completely separate from the merits of the action, is effectively unreviewable on appeal from a final judgment, and is too important to be denied review. *Quackenbush* v. *Allstate Ins. Co.*, 116 S. Ct. 1712, 1718-1719 (1996); *Digital*, 114 S. Ct. at 1995-1996.

In *Digital*, a unanimous Court held that "an order denying effect to a settlement agreement does not come within the narrow ambit of collateral orders" because it does not involve an important question that could not adequately be vindicated on appeal from a final judgment. 114 S. Ct. at 1994, 2004. In particular, the Court emphasized that the district court's order declining to dismiss a case as provided in a private settlement agreement did not rise to the level of importance of the threatened loss of a statutory or constitutional right not to stand trial, and that any

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(1983) (noting "the strong presumption" that judicial review of agency decisions "will be available only when agency action becomes final"); *Carolina Power & Light Co.* v. *United States Dep't of Labor*, 43 F.3d 912, 914 (4th Cir. 1995) (reviewable "order" under Section 5851(c) means final order). Thus, petitioner's sole justification for appellate jurisdiction is that the Secretary's order should be treated as final under the collateral order doctrine. Cf. *DRG Funding Corp.* v. *Secretary of Housing & Urban Dev.*, 76 F.3d 1212, 1220-1221 (D.C. Cir. 1996) (Ginsburg, J., concurring) (suggesting that collateral order doctrine developed in context of 28 U.S.C. 1291's finality requirement applies to review of agency decisions under the Administrative Procedure Act).

need for immediate vindication of rights conferred by a settlement agreement does not outweigh the substantial interests served by the finality requirement. *Id.* at 2001-2004.

The right not to stand trial that petitioner seeks to vindicate here, like the asserted right at stake in *Digital*, is grounded in a settlement agreement. Digital Equipment Corporation asserted that the plaintiff, "for valuable consideration, promised not to sue." See *Digital*, 114 S. Ct. at 2003. Petitioner similarly claims (*e.g.*, Pet. 23) that payment to Corder under the settlement agreement confers on petitioner a right to avoid a hearing such that Corder, having retained the payment, should not be permitted to proceed. This Court in *Digital*, however, made clear that such a "right by agreement" to avoid a trial "does not rise to the level of importance needed for recognition" under the collateral order doctrine. 114 S. Ct. at 2001. Moreover, petitioner's asserted right not to be subject to a hearing is, if anything, weaker than Digital's because it was acquired under an agreement that petitioner concedes (Pet. 22; see Pet. App. 6a) was never cognizable under the ERA because the Secretary never agreed to it.

Petitioner's attempt (Pet. 22) to characterize its asserted right not to stand trial as arising not from a contractual agreement or settlement, but from the constitutional guarantee of due process, is unavailing. The general rule of procedure is that a party is afforded one appeal at the completion of litigation in the initial tribunal. *E.g.*, *Digital*, 114 S. Ct. at 2004; *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981). "Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice," *Cobbledick* v. *United*

States, 309 U.S. 323, 325 (1940), the court of appeals' refusal to review this case in an interlocutory posture does not deny petitioner due process.[7]

Nor are any due process concerns raised by the Secretary's ruling that petitioner cannot assert an affirmative right to restitution of funds in the ERA proceeding. Petitioner voluntarily paid monies to Corder pursuant to the (partially) invalid settlement agreement. Thus, contrary to petitioner's argument (Pet. 21) that "it is the government's involvement which has resulted in * * * [the] deprivation of due process," neither the ALJ nor the Secretary deprived petitioner of the pertinent funds. Cf. *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773, 789 (1980) (Due Process Clause of Fifth Amendment does not extend beyond direct effects of governmental action).

Petitioner's contention (Pet. 23-24) that, once it is subjected to a hearing it allegedly is entitled to avoid, its loss of rights will be "effectively unreviewable," is indistinguishable from many claims of right "that could be enforced appropriately by pretrial dismissal," but are nonetheless not immediately appealable. *Digital*, 114 S. Ct. at 1998. "[T]he mere identification of some interest that would be 'irretrievably lost,'" never alone justifies collateral order review. *Ibid.*; see *Lauro Lines s.r.l.* v. *Chasser*, 490 U.S. 495, 499 (1989) (declining "to find the costs associated with unnecessary litigation to be enough to warrant allowing * * * immediate appeal"); *Johnson* v. *Jones*, 115 S. Ct. 2151, 2155 (1995) (" 'effectively unreviewable' later

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[7] The ERA hearing procedures available on remand meet the demands of due process. See, *e.g.*, 29 C.F.R. 24.5.

on * * * means that failure to review immediately may well cause *significant* harm") (emphasis added).[8]

The right petitioner asserts is not, at bottom, a right to be free from a hearing, but rather a right to restitution of funds. Petitioner has made no showing that its claim to the funds cannot ultimately be vindicated by other means, such as an action for restitution in state court. See *Digital*, 114 S. Ct. at 2003 (noting availability of contract claim under Utah law); Pet. App. 9a n.2 (noting availability of contract claim under Texas law). That petitioner has failed to establish that its asserted right cannot otherwise be vindicated also weighs against departing from the finality requirement of appellate jurisdiction.

2. As noted above, the court of appeals did not address the merits of the Secretary's remand order,

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[8] Petitioner also fails to present any colorable public policy rationale that warrants immediate review of the Secretary's remand order. There is no merit to petitioner's sweeping claims that the Secretary's remand order undermines the entire administrative adjudicatory system. See, *e.g.*, Pet. 24. The Secretary's existing regulations confer ample authority to conduct and manage full and fair hearings and to impose sanctions, including dismissal of an administrative complaint, for conduct that impinges on the integrity of his administrative proceedings. See, *e.g.*, 29 C.F.R. 18.1(b) (waiver, modification or suspension of rules), 18.6(d) (sanctions for compelling answer), 18.29 (ALJ powers), 18.39 (waiver, dismissal, abandonment of claims), 24.5 (whistleblower hearing procedures); see Pet. App. 45a-52a. The Secretary's remand order in this case does not threaten the availability of any of those procedures in the proper circumstances, but simply reflects, as discussed below, that dismissal for failure to prosecute under 29 C.F.R. 24.5(e)(4)(i)(B) is not available either to enforce Corder's promise not to sue under the invalid settlement agreement or to coerce the refund of money paid under the agreement.

nor is the merits issue encompassed within the question presented to this Court. In any event, review of the merits of the Secretary's order would be unwarranted because the order is correct, and it does not conflict with the decision of any court of appeals.

The ERA provides that unless the Secretary consents to the parties' settlement, the Secretary must issue an order "made on the record after notice and opportunity for public hearing." 42 U.S.C. 5851(b)(2)(A) (1988). The Secretary's regulations authorize an ALJ in certain circumstances to dismiss a claim short of a full hearing, including "[u]pon the failure of the complainant to comply with a lawful order of the administrative law judge." 29 C.F.R. 24.5(e)(4)(i)(B). The Secretary, however, concluded that the ERA did not authorize him or the ALJ to order the refund of money paid under an invalid settlement agreement or to condition the availability of a hearing on compliance with such an order. Pet. App. 27a-28a; cf. *Hogue* v. *Southern R.R.*, 390 U.S. 516, 517 (1968) (per curiam) (injured employee need not tender back consideration received under release based on mutual mistake of fact as a "prerequisite to the filing and maintenance of an action" on the same claim; sum paid would be deducted from any award due). Petitioner identifies no provision in the ERA or the Secretary's regulations that authorizes a refund order. Nor can the ALJ's order be considered an exercise of the adjudicator's "inherent power to manage" (Pet. 18) ERA proceedings, because the order required restitution of proceeds paid under an agreement that was not cognizable under the ERA and that resolved matters beyond the ERA claim. The ALJ's refund order thus was not "lawful" under 29 C.F.R. 24.5(e)(4)(i)(B), and the Secretary correctly concluded that the ALJ erred

in dismissing the claim for failure to comply with that order.

* * * * *

Neither the question of the correctness of the Secretary's remand order, nor the question of the court of appeals' jurisdiction to review such an order under the collateral order doctrine, is likely to arise with any frequency. Now that it is clear that the Secretary may not sever objectionable provisions of a settlement agreement, see *Macktal* v. *Secretary of Labor*, 923 F.2d 1150 (5th Cir. 1991), and that administrative complaints will not be dismissed based on settlements to which the Secretary does not consent, see *Macktal* v. *Brown & Root, Inc.*, Case No. 86-ERA-23 (DOL July 11, 1995) (Pet. App. 22a-29a), no prudent employer will make payment under a settlement agreement until after the Secretary has approved the entire agreement. Thus, these issues are not ones of an important or recurring nature that might warrant this Court's review in the absence of a circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1995

BECHTEL ENERGY CORPORATION,

Petitioner,

v.

ROBERT B. REICH, Secretary of Labor,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

In a case brought pursuant to the employee protection provisions of the Energy Reorganization Act of 1974, 42 U.S.C. section 5851, in which

> (1) the complainant and respondent agreed to settle;
>
> (2) the respondent, expecting the Secretary of Labor would approve and join in the settlement as required by the Energy Reorganization Act, paid the complainant the settlement money; and
>
> (3) the Secretary of Labor instead rejected the settlement agreement;

does the collateral order doctrine apply to allow appeal from the Secretary of Labor's decision that he lacks the fundamental adjudicatory powers to bar complainant from proceeding if the complainant does not return the settlement money?

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INTRODUCTION

Respondent raises two main points in opposition to the grant of certiorari: that petitioner's position on the merits is, in any event, wrong, and even if it weren't wrong, this precise factuai situation is unlikely to recur. This reply brief focuses on explaining why the recurrence argument is faulty. It also includes a short discussion about why respondent's cursory argument attempting to refute the merits of petitioner's position simply raises more questions and underscores their significance.

ARGUMENT

A. Respondent's Recurrence Argument Fails to Recognize That The General Principles Contained in This Fact Situation Are Unresolved and Likely to Recur.

Respondent argues that it is now settled law that "the Secretary may not sever objectionable provisions of a settlement agreement" and that "administrative complaints will not be dismissed based on settlements to which the Secretary does not consent" and therefore "no prudent employer will make payment under a settlement agreement until after the Secretary has approved the entire agreement." From this Respondent concludes that "these issues are not ones of an important or recurring nature. . . . " Even assuming that this precise factual situation is unlikely to arise again, future cases involving the broader legal issues presented in this case – (1) appealability and (2) the nature and extent of the Secretary's adjudicatory powers – are virtually inevitable.

1. Appealability

As for the threshold question of appealability, this case presents at least two aspects of the collateral order doctrine which is likely to recur and merits clarification by this Court. One aspect is whether the type of interest at stake is vindicable absent immediate appeal. The other aspect of the collateral order doctrine – the importance of the question involved – is intertwined with the underlying issue on the merits: the nature and extent of the Secretary's adjudicatory powers. This second aspect will be discussed in the following section.

The answer to whether or not the interest at stake is vindicable without immediate appeal turns on whether the facts of this case more closely resemble *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S.Ct. 1992 (1994) or *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 545, 546 (1949). As argued in the Petition, this case resembles *Digital* superficially, but in substance is practically the same as *Cohen* (holding that the collateral order doctrine applies to an order that a plaintiff need not post a bond to proceed). However, the Secretary and the Fifth Circuit have grouped this case with *Digital*, despite the fact that it is indistinguishable from *Cohen* with respect to the critical issue: must the plaintiff pay (or return) money in order to proceed.

Undoubtedly cases presenting the question of when a plaintiff must pay (or return) money in order to proceed will arise in the future; moreover, some of those cases will present the issue of whether a determination by the tribunal of first instance that the plaintiff needn't pay is appealable pursuant to the collateral appeal doctrine.

This Court should grant certiorari in order to draw the line between *Cohen*-type and *Digital*-type cases more precisely.[1]

2. Nature and Extent of the Secretary's Adjudicatory Powers.

Should certiorari be denied, the other question which would be left unaddressed by both this Court and the federal judiciary is the nature and extent of the Secretary's adjudicatory powers. As mentioned above, this issue also affects the analysis of one of the requirements of the collateral order doctrine: the presence of a sufficiently important question.[2] Once again, *Digital* does not control this case. *Digital* involved an attempt to enforce a settlement agreement through an interlocutory appeal, the interpretation of which would require the resolution of factual issues intertwined with the entire case on the merits. The case *sub judice* involves a completely collateral and *a priori* issue about the Secretary's powers to

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[1] Bechtel, of course, maintains that this case is like *Cohen*, not *Digital*, and so is not asking (in the first instance) that *Digital* should be overturned. However, in the alternative, if the case *sub judice* is determined to fall within the purview of *Digital*, Bechtel would urge that *Digital* be overturned to the extent necessary to protect a litigant's right to fairness in the proceedings. Indeed, if this Court deemed the case at bar to fall within the scope of *Digital*, some explanation or guidance as to how *Digital* and *Cohen* can be read together would be in order.

[2] This Court has recently reconfirmed the independent requirement of "importance," *see Digital*, 114 S.Ct. at 2001 and it is this requirement which necessitated a detailed overview in the petition of Bechtel's argument on the merits.

ensure a fair trial for Petitioner.[3] As explained in the Petition, the resolution of this question requires analysis and interpretation of the source of the Secretary's fundamental adjudicatory powers. For example, does the Administrative Procedures Act, federal common law, and/or a tribunal's "inherent powers to manage litigation" apply to safeguard the fairness of the proceedings?

Future cases such as this one questioning the fundamental bases of administrative agencies' adjudicatory powers are virtually inevitable. However, absent appeal pursuant to the collateral order doctrine, it is unlikely that the federal judiciary, let alone this Court, will ever have an opportunity to clarify these issues.

B. Respondent's Cursory Attempt To Refute The Merits of Bechtel's Position Simply Raises More Questions and Underscores Their Significance.

Respondent's brief, by virtue of its attempt to peremptorily dispose of petitioner's position on the merits, actually underscores the presence of important and disputed questions which should be heard by this Court. Indeed, in several instances, Respondent's brief fails to grasp (or, at the least, acknowledge) the actual points which Bechtel is asserting.

For example, Respondent mischaracterizes Bechtel's argument as asserting a "right not to stand trial" (Resp. 9)

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[3] Despite the Respondent's efforts to the contrary, the case at bar does not hinge on, or even really concern, the terms and details of the settlement agreement. Rather, it concerns threshold questions of law about the Secretary's powers.

when Bechtel is attempting to vindicate a right to fairness in the proceedings. It is tautologous that every right to a fair trial is also a right not to be subjected to an unfair trial, and it merely obfuscates the issue to state it as the "right not to stand trial." Bechtel is not asserting that it has an absolute right not to stand trial, but rather that it has a right to a fair trial. Nor is it asserting that its right is based on an "agreement"; to the contrary, regardless of any agreement, it is still, nevertheless, entitled to fairness in the proceedings.

Respondent's argument at pages 9-10 also misses (or ignores) the points that (1) the fact Bechtel has a constitutional right to due process supports Bechtel's position that the question involved is an important one, and (2) the fact that Bechtel's right to fairness in the proceedings can only be protected by immediate collateral order appeal supports Bechtel's position that its rights are otherwise not vindicable.

Respondent's peremptory treatment of the issue of governmental action (Resp. 10) likewise ignores the bald fact that the administrative adjudicatory system as interpreted by the Secretary deprives Bechtel of inherent basic fairness in the proceedings and, if continued to be applied consistently, would undermine the Secretary's powers to efficiently manage adjudications. Indeed, the Secretary's argument to the contrary, (Resp. n.8), merely begs the question by arguing that the Secretary's regulations confer "ample authority to conduct full and fair hearings and to impose sanctions . . . for conduct that impinges on the integrity of his administrative proceedings." Respondent ignores, or misses, the point that the basis of the Secretary's rationale for his decision in the

case *sub judice* is inconsistent with, and undermines, these very same regulations. Respondent's argument gives short shrift to the ultimate threshold question regarding the sources and nature of the Secretary's powers.

Finally, Respondent's observation that there is no conflict among the circuits simply underscores the fact that the nature of the issues presented are such that, absent collateral order appeal, they are unlikely to be reached by the federal judiciary at all, let alone this Court. Indeed, respondent totally ignores the reasons presented by the petition (Pet. 6) for granting certiorari: (1) the Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, and (2) the Fifth Circuit has sanctioned such a departure by the Secretary from the accepted and usual course of judicial proceedings as to call for exercise of this Court's supervisory power.

Thus, Respondent's brief resolves nothing and simply raises more questions, important questions, which merit this Court's attention. Respondent, rather than demonstrate the lack of significant and disputed questions, instead has buttressed the conclusion that the petition should be heard.

CONCLUSION

The petition for a writ of certiorari should be granted.

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